2008 WL 362556, at *11 (D. Or. Feb. 8, 2008) (holding that when a plaintiff's invasion of privacy claim is "premised solely upon her assertion that [a defendant] committed an intentional assault . . . plaintiff cannot circumvent the Federal Tort Claims Act's intentional tort exception through artful pleading"). *See also Sabow v. United States*, 93 F.3d 1445, 1456 (9th Cir. 1996), *as amended* (Sept. 26, 1996) (holding that courts must "look beyond a plaintiff's classification of the cause of action to examine whether the conduct upon which the claim is based constitutes one of the torts listed in § 2680(h)").

The Ninth Circuit has recognized that because direct assault or battery claims are plainly barred by the intentional tort exception, an intentionally inflicted emotional distress ("IIED") claim must be sufficiently distinct from a sexual assault claim to fall outside of the exception. *Xue Lu*, 621 F.3d 944 at 950. In *Xue Lu*, an asylum officer molested asylum applicants and demanded sexual favors in exchange for conferring some benefit on their applications. *Id.* at 946. The Ninth Circuit held that the plaintiffs' IIED claims would be barred by the intentional tort exception if the claims were only premised on the molestation but would not be barred if premised on the distinct injury arising from the demands for sexual favors conditional on some benefit. *Id.* at 950.

Here, Plaintiffs' IIED claims (Count 2) do not fall outside of the intentional tort exception because they are mostly premised on Dr. Jane having sex with Adam, or in the cases of Smith and George, from learning about Dr. Jane having sex with Adam. Dr. Jane never made any demands that were conditional on some benefit she could offer Plaintiffs. Rather, most of the harms Plaintiffs suffered were caused by Dr. Jane's intentional torts arising from her pursuit of Adam for sex. For example, Dr. Jane would manipulate Adam into thinking that he was suicidal if he did not submit to her desire to have a sexual relationship with him, at one point even hinting to commit him for suicidality. Ex. AA. In addition, Dr. Jane convinced Adam to stop taking his prescription medication, drugged him with Ayahuasca, convinced him he did not have a drinking problem, and isolated him from his family and friends all so that she could get closer to him and have sex with him. Adam Dep. at 66:18-67:25; 68:2-7; 68:8-21; 69:4-20. Thus, all of Dr. Jane's actions, and any harms Plaintiffs suffered from those actions, are inseparable from her sexual battery of Adam. Unlike the plaintiffs in *Xue Lu*, Plaintiffs have not alleged any injuries underlying the IIED claim that are distinct enough from the claims related to Dr. Jane's sexual battery of Adam. Therefore, this claim must also be barred.

Applicant Details

First Name	**Anthony**
Middle Initial	**E**
Last Name	**Birong**
Citizenship Status	**U. S. Citizen**
Email Address	**abirong@lawnet.uci.edu**
Address	**Address** Street **5104 Palo Verde Rd.** City **Irvine** State/Territory **California** Zip **92617** Country **United States**
Contact Phone Number	**562-370-6354**

Applicant Education

BA/BS From	**Norwich University**
Date of BA/BS	**September 2019**
JD/LLB From	**University of California, Irvine School of Law** **http://www.law.uci.edu**
Date of JD/LLB	**May 11, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**UC Irvine Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Leslie, Christopher
cleslie@law.uci.edu
949-824-5556

Barron, Ben
Ben.Barron@usdoj.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ANTHONY BIRONG
5104 Palo Verde Road, Irvine, CA 92617 ● abirong@lawnet.uci.edu ● (562) 370-6354

June 12, 2023

The Honorable Juan R. Sánchez
United States District Court for the Eastern District of Pennsylvania
601 Market Street
Courtroom 14-B
Philadelphia, PA 19106

Chief Judge Sánchez:

I am a rising third-year law student at the University of California, Irvine School of Law (UCI Law), and I am applying for a clerkship in your chambers for the 2024–25 term. I am particularly interested in clerking in your chambers because of your public service background and criminal law experience. I believe that my training at UCI Law, my externships with the Honorable Otis D. Wright II and the United States Attorney's Office, and my military experience will make me a valuable addition to your chambers.

Prior to law school, I served for six years on active duty in the United States Navy as a Special Warfare Boat Operator (SWCC). I held the roles of lead navigator and lead communicator. As lead navigator, I conducted thorough research, drafted detailed navigation plans, and frequently presented to senior officers. As lead communicator, I collaborated with various government agencies and acted as my team's liaison during dynamic military operations and exercises. Over the course of six years and two deployments, I received the Joint Special Achievement Medal and two Navy and Marine Corps Achievement Medals for outstanding performance of my duties. My attention to detail, eagerness to learn, and positive attitude allowed me to thrive in high-stress situations. I am a 100% Permanent and Total Disabled Veteran. I am confident that these experiences will make me a motivated, productive, and valued member of your chambers.

My education, legal experiences, and my strong legal research and writing skills will help me succeed as your clerk. In my first year at UCI Law, I received the second-highest grade in Lawyering Skills, the legal research and writing course at UCI Law. Last summer, I externed for the Honorable Otis D. Wright II. I was exposed to a wide range of criminal and civil cases, and I learned how judges and clerks balance judicial efficiency and justice. As an extern for the United States Attorney's Office last fall, I researched criminal statutes and criminal procedure and helped Assistant United States Attorneys draft indictment memos, pretrial motions, sentencing positions, and appellate briefs. I will be returning to the office this fall as a certified law student, where I will make appearances before magistrate judges and first chair misdemeanor trials. As a research assistant to Professor Christopher Leslie, I have extensively researched antitrust law, civil procedure, and banking practices. As a research fellow for Professor Grace Tonner, I provide verbal and written feedback to first-year law students. I have received pro bono awards for my volunteer legal services at the Veterans Legal Institute, Community Legal Aid SoCal, and the United States Marine Corps Camp Pendleton Legal Assistance Office. Finally, I am a member of the *UC Irvine Law Review*.

I hope to translate my experiences and credentials into a successful tenure as your clerk. Enclosed you will find my resume, a writing sample, my academic transcripts, and letters of recommendation from Professor Christopher Leslie and Assistant United States Attorney Ben Barron. Thank you for your consideration.

Very Respectfully,

Anthony Birong

ANTHONY BIRONG

5104 Palo Verde Road, Irvine, CA 92617 ● abirong@lawnet.uci.edu ● (562) 370-6354

EDUCATION

University of California, Irvine, School of Law, Irvine, CA
Juris Doctor expected May 2024, GPA: 3.45

Activities: *UC Irvine Law Review*, Associate Editor
Veterans Law Society, Co-Founder & Secretary
Criminal Law Society, Board Member
Lawyering Skills Research Fellow for Professor Grace Tonner

Pro Bono: United States Marine Corps Camp Pendleton Legal Assistance Office
Veterans Legal Institute
Community Legal Aid SoCal

Norwich University, Northfield, VT
Bachelor of Science in Criminal Justice, *summa cum laude*, September 2019, GPA: 3.92

LEGAL EXPERIENCE

United States Attorney's Office, Santa Ana, CA — Expected August – December 2023
Certified Law Student

Morgan, Lewis & Bockius LLP, Costa Mesa, CA — May – July 2023
Summer Associate

University of California, Irvine School of Law, Irvine, CA — May 2022 – Present
Research Assistant to Professor Christopher Leslie. Work closely with professor to research antitrust law and banking practices. Present factual and legal findings to professor. Provide analysis and recommendations on draft law review articles.

United States Attorney's Office, Santa Ana, CA — August – December 2022
Criminal Division Extern. Reviewed police reports, investigation reports, criminal records, and police body camera footage. Observed execution of search warrants, proffers, reverse proffers, and jury trials. Assisted federal law enforcement officers and Assistant United States Attorneys draft search warrants, indictment memos, pretrial motions, sentencing positions, and appellate briefs.

United States District Court, Central District of California, Los Angeles, CA — May – August 2022
Judicial Extern to the Honorable Otis D. Wright II. Analyzed, researched, and briefed matters filed with court. Reviewed and edited orders and opinions. Researched, prepared, and drafted memoranda, orders, and opinions addressing state and federal law, commercial disputes, and criminal law.

EMPLOYMENT

United States Navy Reserve, SEAL Team 17, Coronado, CA — July 2021 – July 2023
Special Warfare Boat Operator (SWCC). Maintain administrative and physical requirements necessary to deploy on an as-needed basis. Attend monthly requalification training necessary for special operations deployments including parachute, cold weather, and weapon proficiency training.

United States Navy, Special Boat Team 12, Coronado, CA — July 2015 – July 2021
Special Warfare Boat Operator (SWCC). Studied local geography and customs to plan special operations missions in support of Global War on Terrorism. Collaborated with military and government agencies. Drafted research documents and presented plans to senior military officials. Trained and instructed foreign military special operations groups on maritime special operations tactics and counterterrorism.

SKILLS AND INTERESTS

Certified SCUBA diver. Licensed skydiver. Interests include hiking, traveling, and golfing.

(Print This Page)

Birong, Anthony E. (40962858)

Birong, Anthony E. (40962858)
LAW (SCHOOL OF LAW)

Your transcript below is not official and is informational only. It is not for use as a verification of enrollment.

Official transcripts, verifications of enrollment, or other records may be requested from the University Registrar. Refer to the Services section on our website.

********* THIS IS NOT AN OFFICIAL TRANSCRIPT *********

Previous Degrees

B.S. 09/19 NORWICH UNIV

Memoranda

LAW 506A - DEANS AWARD - FALL 2021

PRO BONO - 50 HOUR AWARD - 2021-22

PRO BONO - ACHIEVEMENT (50+ HRS) - 2022-23

2021 Fall Semester

PROCEDURAL ANALYSIS	LAW	504	4.0	B	12.0	
LAWYERING SKILLS I	LAW	506A	3.0	A+	12.9	
LEGAL PROFESSION I	LAW	507	3.0	B-	8.1	
LEG RESEARCH PRAC	LAW	508	1.0	S	0.0	SU
COM LAW: CONTRACTS	LAW	500	4.0	A	16.0	

Term Totals ATTM: 14.0 PSSD: 14.0 GPTS: 49.0 GPA: 3.500

Cumulative Totals ATTM: 14.0 PSSD: 14.0 GPTS: 49.0 GPA: 3.500

2022 Spring Semester

COMMON LAW: TORTS	LAW	501	4.0	A	16.0	
STATUTORY ANALYSIS	LAW	503	3.0	B	9.0	
CON ANALYSIS	LAW	502	4.0	B-	10.8	
LAW SKILLS II	LAW	506B	3.0	A	12.0	
LEG & STAT INTERP.	LAW	580	2.0	B+	6.6	

Term Totals ATTM: 16.0 PSSD: 16.0 GPTS: 54.4 GPA: 3.400

Cumulative Totals ATTM: 30.0 PSSD: 30.0 GPTS: 103.4 GPA: 3.447

2022 Fall Semester

CRIMINAL PROCEDURE	LAW	513	3.0	A-	11.1	
EVIDENCE	LAW	514	3.0	A	12.0	
PART-TIME EXTRNSHIP	LAW	597PT	4.0	S	0.0	SU
RESEARCH FELLOW	LAW	298T	2.0	S	0.0	SU
PART-TIME EXT SUM	LAW	597X	4.0	S	0.0	SU
LAW REVIEW	LAW	598R	1.0	S	0.0	SU

Term Totals ATTM: 6.0 PSSD: 6.0 GPTS: 23.1 GPA: 3.850

Cumulative Totals ATTM: 36.0 PSSD: 36.0 GPTS: 126.5 GPA: 3.514

2023 Spring Semester

BUSINESS ASSOC	LAW	511	3.0	B+	9.9
PROPERTY	LAW	517	4.0	B+	13.2
REMEDIES	LAW	518	3.0	B	9.0
CRIM TRIAL ADVOCACY	LAW	5941	2.0	A-	7.4
RACE LAW CAPITALISM	LAW	5778	3.0	B+	9.9
RESEARCH FELLOW	LAW	298T	2.0	S	0.0 SU

Term Totals **ATTM: 15.0** **PSSD: 15.0** **GPTS: 49.4** **GPA: 3.293**

Cumulative Totals **ATTM: 51.0** **PSSD: 51.0** **GPTS: 175.9** **GPA: 3.449**

INCOMPLETE GRADES:	0	**UNITS:**	0.0
NR GRADES:	0	**UNITS:**	0.0
P/NP GRADES:	0	**UNITS:**	0.0
S/U GRADES:	6	**UNITS:**	14.0
W GRADES:	0	**UNITS:**	0.0

GRADE UNITS ATTEMPTED	51.0	**GRADE POINTS**	175.9	**UC GPA**	3.449
TOTAL UNITS PASSED	51.0	**UNITS COMPLETED**	65.0		

********* THIS IS NOT AN OFFICIAL TRANSCRIPT *********

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Anthony Birong

Dear Judge Sanchez:

I write to recommend that you hire Anthony Birong as one of your judicial clerks. In his first semester of law school, Anthony was a student in my first-year Contracts class (called Common Law Analysis: Contracts). Anthony was an active participant in class discussions. I use the Socratic Method but rely on volunteers. Anthony was one of the few students who was always willing to engage. His comments were unfailingly thoughtful and on point. Anthony performed excellently in the class, writing a very strong final. Overall, it was a real standout performance and earned him an A in a very competitive class.

Although the class had 43 students, I got to know Anthony very well during office hours and other events outside of class. He is intellectually curious and whip smart. I thought so highly of Anthony that I asked him to be my Research Assistant. Anthony has performed extensive research for my project on banking deserts, which are communities without access to bank branches. He wrote memoranda about relationship lending, the practice of bankers extending credit based on personal knowledge of the borrower as opposed to credit scores and hard data. Anthony researched historical changes in relationship lending and how minority buyers now rely on relationship lending. He studied DOJ Banking Merger Guidelines, including how the Federal Reserve defines geographic markets. In addition to discussing several bank merger cases in the last 40 years, Anthony also performed a case study on a bank merger that proved pivotal in my scholarship. Overall, this project involved extensive factual, legal, and empirical research.

Beyond this large-scale project, Anthony also performed research on price-fixing defendants who argue that they cannot be liable for price fixing because they cheated on the cartel agreement. This is a particularly difficult assignment that I have had previous research assistants attempt. Anthony found relevant caselaw that others had not. I was very impressed with his research skills. Finally, he researched caselaw interpreting and applying summary judgement standards in antitrust and non-antitrust opinions. His work product was exactly what I asked for and was very helpful.

In addition to his original research, Anthony proofread and provided useful comments on several of my projects, including a new edition of an Antitrust Law casebook that I co-author, an article on how predatory pricing jurisprudence has influenced antitrust doctrine, and a paper on how the Respect for Marriage Act applies to U.S. territories. For each project, Anthony provided valuable suggestions that improved my scholarship. This bodes well for his ability to work with his co-clerks to improve their bench memos and draft opinions.

Anthony is an incredibly hard worker. During his first summer, he performed this research in addition to his full-time externship with a federal judge. Anthony never begrudges hard work and approaches all tasks with enthusiasm and a great attitude. He asks smart questions and is always clear on deadlines and expectations.

Finally, on a personal level, Anthony is one of the nicest, most humble people you will ever meet. He is always upbeat and generous, with an excellent sense of humor. I have enjoyed my conversations with him immensely.

In sum, Anthony would be a great addition to your chambers. If you have any questions, please feel free to contact me at cleslie@law.uci.edu or (949) 824-5556.

Sincerely,

Christopher Leslie
Chancellor's Professor of Law

United States Department of Justice

United States Attorney's Office
Central District of California

Benjamin R. Barron
Phone: (714) 338-3536
E-mail: Ben.Barron@usdoj.gov

Ronald Reagan Federal Bldg & U.S. Courthouse
411West Fourth Street, Suite 8000
Santa Ana, California 92701

June 8, 2023

To whom it may concern,

I am writing to enthusiastically recommend Anthony Birong for a judicial clerkship in your chambers. Anthony served as a law school extern with my office during his Fall 2022 semester. He will be returning to my office as an extern this coming fall. Anthony stood out early into his externship. He sought out difficult assignments, produced excellent work, and was a pleasure to work with. His research memos and draft language for briefs were well organized, detailed, and hit all the salient points. Anthony met all deadlines and did a great job communicating progress.

Early into his externship, we felt comfortable trusting Anthony to take on important assignments. For example, Anthony provided research support and draft language for a Ninth Circuit brief on a novel issue of statutory construction. Anthony's analysis was thoughtful and comprehensive, and we used much of his draft language in the filed brief. As a further example, Anthony prepared a research memorandum addressing the anticipated trial defense in a murder case, and he drafted a related jury instruction used by the prosecution team.

In terms of demeanor, Anthony has a positive and even-tempered attitude. He worked well with his fellow externs and my office's attorneys. Moreover, we were impressed with Anthony's passion for public service. He often spoke about how his experience in the United States Navy led him to apply to law school, and about his pro bono work for veterans and victims of domestic violence. It was clear to me and the rest of my office that Anthony genuinely wants to devote his legal career toward helping his community and others in need.

Ultimately, I am confident that Anthony's passion and work ethic will benefit your chambers just as it has my office. I recommend him without reservation.

You are welcome to contact me if you have any questions or want any additional information.

Very truly yours,

Benjamin R. Barron
Assistant United States Attorney
Chief, Santa Ana Branch Office

ANTHONY BIRONG
5104 Palo Verde Road, Irvine, CA 92617 • abirong@lawnet.uci.edu • (562) 370-6354

The attached writing sample is an order I drafted as a judicial extern to the Honorable Otis D. Wright II. This order was lightly edited by Judge Wright's clerks and reviewed by Judge Wright. Names and dates have been changed or redacted per Judge Wright's requirements. I have received permission to use this order as a writing sample.

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I. INTRODUCTION

On [redacted], Plaintiff Lola Jackson initiated this action in state court against Defendants ABC Co. and "Devin," an individual. (Notice of Removal ("NOR"), Ex. 1 ("Complaint" or "Compl."), ECF No. 1-1.) On [redacted], ABC removed the case to this Court based on diversity jurisdiction. (NOR, ECF No. 1.) Jackson now moves to remand. (Mot. Remand ("Motion" or "Mot."), ECF No. 20.) For the reasons below, the Court finds it has subject matter jurisdiction and accordingly **DENIES** Jackson's Motion.[1]

II. BACKGROUND

As Jackson alleges, on [redacted], Jackson was visiting ABC's store to purchase miscellaneous items. (Compl. ¶¶ 8, 14.) After entering the store, Jackson slipped on a substance on the floor and fell, sustaining injuries. (*Id.*) Jackson alleges that an individual named Devin was the supervisor of the store responsible for maintenance at the time of her fall. (*Id.* ¶ 3.)

Jackson originally filed this action in state court, asserting causes of action for negligence and premises liability against ABC and "Devin." (*Id.* ¶¶ 7–17.) ABC later removed this action to federal court based on diversity jurisdiction, asserting that: (1) ABC is a citizen of Arkansas and Delaware; (2) Jackson is a citizen of California; (3) Devin's citizenship should be disregarded; and (4) the amount in controversy exceeds $75,000. (NOR 3.) ABC therefore contends that this Court has subject matter jurisdiction.

On [redacted], the Court questioned its jurisdiction and ordered ABC to show cause why this action should not be remanded to state court for lack of subject matter jurisdiction. (Order Show Cause ("OSC"), ECF No. 10.) On [redacted], ABC responded to the Court's Order to Show Cause, (Resp. OSC, ECF No. 11), and amended its Notice of Removal, (Am. NOR, ECF No. 11). On [redacted], the Court, satisfied with ABC's showing

[1] Having carefully considered the papers filed in connection with the Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

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and amended notice of removal, discharged the Order to Show Cause. (Min. Order, ECF No. 13.)

Subsequently, on [redacted], Jackson moved to remand on the ground that ABC failed to establish diversity jurisdiction. (*See generally* Mot.) In her Motion, Jackson asserts that Devin, whose real identity is unknown, is a citizen of California and defeats diversity. (*Id.* at 21.) Jackson also contends that ABC has failed to establish that the amount in controversy exceeds $75,000. (*Id.* at 23.) Finally, Jackson seeks attorneys' fees in association with her Motion. (*Id.* at 28–30.) ABC opposes the Motion. (*See* Opp'n, ECF No. 22.) Jackson did not file a Reply.

III. LEGAL STANDARD

Federal courts have subject matter jurisdiction only as authorized by the Constitution and Congress. U.S. Const. art. III, § 2, cl. 1; *see also Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). When a suit is filed in state court, the suit may be removed to federal court only if federal court would have had original jurisdiction. 28 U.S.C. § 1441(a). Federal courts have original jurisdiction when an action arises under federal law or where there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000. *Id.* §§ 1331, 1332(a).

Courts strictly construe the removal statute against removal and "federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The party seeking removal bears the burden of establishing federal jurisdiction. *Id.*

IV. DISCUSSION

The Court finds that it has subject matter jurisdiction because the parties are diverse and the amount in controversy is met. Accordingly, as explained below, the Court denies Jackson's Motion to remand and request for attorneys' fees.

A. Diversity of Citizenship

At the outset, it is uncontroverted that there is complete diversity of citizenship between Jackson and ABC. Jackson is a citizen of California and ABC is a citizen of

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Delaware, where it is incorporated, and of Arkansas, where it holds its principal place of business. (NOR 3.) However, Jackson contends that ABC has failed to establish diversity of citizenship because Jackson alleges that Devin is a citizen of California. (Mot. 2, 21; Compl. ¶ 3.) The Court disagrees, and finds that the parties are diverse from each other because Devin is a fictitious defendant whose citizenship may be disregarded.

"In determining whether a civil action is removable on the basis of jurisdiction under section 1332(a) . . . the citizenship of defendants sued under fictitious names shall be disregarded." 28 U.S.C. § 1441(b)(1). The Ninth Circuit has explicitly held that "[t]he citizenship of fictitious defendants is disregarded for removal purposes and becomes relevant only if and when the plaintiff seeks leave to substitute a named defendant." *Soliman v. Philip Morris Inc.*, 311 F.3d 966, 971 (9th Cir. 2002).

Some courts have found a distinction between "fictitious" and "real" Does. *See, e.g.*, *Gardiner Fam., LLC v. Crimson Res. Mgmt. Corp.*, 147 F. Supp. 3d 1029, 1036 (E.D. Cal. 2015). Courts considering this distinction assess whether the "[p]laintiffs' description of Doe defendants or their activities is specific enough as to suggest their identity, citizenship, or relationship to the action." *Id.*; *see Johnson v. Starbucks Corp.*, 475 F. Supp. 3d 1080, 1083 (C.D. Cal. 2020).

Jackson contends that Devin is not "wholly fictitious" and may not be disregarded. (Mot. 21.) The Court disagrees. Without including a last name or any other identifying details, Jackson merely identifies Devin as "a supervisor and/or manager of the store at the time of Plaintiff's slip and fall" who was "responsible for the maintenance of the store." (Compl. ¶ 3.) This description is not specific enough to suggest Devin's identity and therefore is insufficient to render Devin a real Defendant.

Moreover, Jackson has been unable to supplement Devin's identity, even after conducting discovery. ABC provided Jackson witness statements and an incident report. (*See* Decl. [redacted] ISO Opp'n ¶¶ 6, 7, Exs. 1, 2, ECF No. 22-3.) Neither lists any employee named Devin. At the time of the incident, there were no managers responsible

ANTHONY BIRONG
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for maintenance of the store named Devin.[2] (Decl. [redacted] ISO Am. NOR ¶ 8, ECF No. 12-12.)

Therefore, Devin is a fictitious defendant. Pursuant to the plain language of 28 U.S.C. § 1441(b)(1) and Ninth Circuit precedent, this Court cannot consider Devin's citizenship unless and until Jackson seeks leave to substitute a named defendant. Accordingly, this Court looks only to the citizenships of Jackson and ABC and finds that complete diversity exists for the purpose of establishing subject matter jurisdiction.

B. Amount in Controversy

Jackson contends that ABC fails to establish that the amount in controversy exceeds $75,000. (Mot. 23–26.) However, the Court finds that the amount in controversy is met because Jackson has previously admitted that the amount in controversy exceeds $75,000.

"[A] defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 89 (2014). If the plaintiff disputes the alleged amount in controversy, "both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied." *Id.* at 88. "The parties may submit evidence outside the complaint, including affidavits or declarations, or other 'summary-judgment-type evidence relevant to the amount in controversy at the time of removal.'" *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015) (quoting *Singer v. State Farm Mut. Auto. Ins. Co.*,

[2] In any case, as ABC correctly points out, a person's place of employment alone does not implicate their citizenship status. *See Garcia v. Walmart, Inc.*, No. 2:22-cv-00371-SVW-MRW, 2022 WL 796197, at *3 (C.D. Cal. March 16, 2022) ("[A] person's place of employment does not certainly implicate their citizenship status, especially in a state as diverse as California comprised of out-of-state college students, immigrants from different countries and many other multinationals." (internal quotation marks omitted)). Therefore, even if Devin was properly identified as a real party to this action, the Court still could not, at this time, conclude that Devin indeed is a California citizen and defeats diversity.

ANTHONY BIRONG
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116 F.3d 373, 377 (9th Cir. 1997)). "[A] defendant cannot establish removal jurisdiction by mere speculation and conjecture, with unreasonable assumptions." *Id.*

Jackson does not allege a specific amount of damages, but seeks to recover general damages, medical expenses, loss of earnings, interest, and costs of suit. (Compl. 5, Prayer for Relief.) ABC plausibly alleges that the amount in controversy exceeds $75,000, (NOR 3), and supports this allegation with Jackson's own admission, in response to ABCs Request for Admissions, that her damages exceed $75,000, (Decl. [redacted] ISO NOR ("[redacted] Decl. ISO NOR"), Ex. 7 No. 48, ECF No. 1-7; [redacted] Decl. ISO NOR, Ex. 8 No. 48, ECF No. 1-8). Thus, ABC has established removal jurisdiction with evidence rather than by mere speculation and conjecture based on unreasonable assumptions. *See Garcia*, 2022 WL 796197, at *1 n.1 (C.D. Cal. Mar. 16, 2022) (finding that the amount in controversy was satisfied because in the plaintiff's response to requests for admission, the "Plaintiff explicitly admitted that he seeks damages in excess of $75,000"). Accordingly, the Court finds the amount in controversy exceeds $75,000 for the purpose of establishing diversity jurisdiction and that the Court therefore finds that it has subject-matter jurisdiction over this action.

V. CONCLUSION

For the reasons discussed above, the Court **DENIES** Jackson's Motion to Remand, (ECF No. 20), and **DENIES** Jackson's request for attorneys' fees and costs incurred in association with the Motion.

Applicant Details

First Name	**Cameron**
Middle Initial	**L**
Last Name	**Bishop**
Citizenship Status	**U. S. Citizen**
Email Address	**cbishop@albanylaw.edu**
Address	**Address** Street **415 Engleman Avenue** City **Scotia** State/Territory **New York** Zip **12302** Country **United States**
Contact Phone Number	**5188594771**

Applicant Education

BA/BS From	**Siena College**
Date of BA/BS	**January 2021**
JD/LLB From	**Albany Law School** **http://www.albanylaw.edu/**
Date of JD/LLB	**May 17, 2024**
Class Rank	**10%**
Law Review/Journal	**Yes**
Journal(s)	**Albany Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Domenick L. Gabrielli Appellate Advocacy Moot Court Competition** **Donna Jo Morse Client Counseling Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Mayer, Connie
cmaye@albanylaw.edu
(518) 445-2393
Connors, Patrick
pconn@albanylaw.edu
Wetmore, Michael
mwetm@albanylaw.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Cameron Bishop
415 Engleman Avenue, Scotia, New York 12302 · cbishop@albanylaw.edu · +1 (518) 859-4771

June 12, 2023

The Honorable Juan R. Sanchez
United States District Court, Eastern District of Pennsylvania

Dear Judge Sanchez:

I write to express my interest in a clerkship in your chambers beginning in the 2024 term. I am a third-year student in the top 7% of my class at Albany Law School and have been interested in the federal judiciary since beginning law school. I achieved academic success in law school while simultaneously working part-time with a small law firm and interning with the Schenectady County District Attorney's Office. I would like to increase my knowledge of the federal court system and bring my strong research and writing abilities to the work of your chambers.

In law school, I have taken a particular interest in classes focused on federal laws. I have specifically enjoyed my time as a teaching assistant for Federal Civil Procedure, where I assisted the professor in helping students and reviewing their essays. I have furthered my interest in the judiciary by competing in Albany Law School's Gabrielli Appellate Advocacy Competition (Gabrielli Competition), where I was a finalist and won Best Oral Advocate Award in the competition. My experience as a sub-editor with the *Albany Law Review* has also improved my legal writing and research skills. I purposefully decided not to run for a position on the editorial board of the *Albany Law Review* because of my desire to engage in pro-bono work through the New York State Pro Bono Scholars Program next spring to give back to the community that has provided me with so much. If accepted into the program, I would complete the Uniform Bar Exam in February 2024 and graduate in May 2024. I will return to the *Albany Law Review* as an associate editor this fall.

As an intern with the Schenectady County District Attorney's Office for the last year, I wrote the respondent's brief for the appellate court in several cases. I also wrote letters to the Court of Appeals requesting the denial of the appellants' requests for leave to appeal and responses to the defendants' motions seeking relief under the Criminal Procedure Law § 440. This experience has enriched my understanding of the courts, and I would like to deepen that knowledge with experience in the federal judiciary through your chambers.

Enclosed please find my resume, law school transcript, writing sample, and letters of recommendation. My writing sample is the portion of my respondent's brief that I drafted for the Gabrielli Competition. Professors Connie Mayer, Patrick Connors, and Michael Wetmore have written my letters of recommendation. Upon your request, I would be happy to provide you with any additional information you wish to review. Thank you for considering my candidacy. I hope to have the opportunity to interview with you.

Sincerely,

Cameron Bishop

Cameron Bishop

Cameron Bishop
415 Engleman Avenue, Scotia, New York 12302 · cbishop@albanylaw.edu · +1 (518) 859-4771

EDUCATION

Albany Law School of Union University, Albany, NY
Candidate for Juris Doctor, May 2024
Class Rank: Top 7% (13/188: GPA: 3.92)
Honors: *Albany Law Review*; Dean Thomas Sponsler Honors Teaching Fellowship Program; Dean's List (Fall 2021 - Spring 2023)
Activities: Domenick L. Gabrielli Appellate Advocacy Moot Court Competition, Finalist and Best Oral Advocate; Donna Jo Morse Client Counseling Competition, Participant; Federal Civil Procedure and Criminal Law, Teaching Assistant

Siena College, Loudonville, NY
Bachelor of Arts, *magna cum laude*, Political Science, Pre-Law Certificate, December 2020
GPA: 3.74
Honors: Standish Honors Program; Pi Sigma Alpha and Pi Gamma Mu Honor Societies
Activities: Captain, Siena College Mock Trial Team

RELEVANT EXPERIENCE

Hon. Mae D'Agostino, U.S. District Court, N.D.N.Y., Albany, NY
Legal Intern To Commence August 2023

Professor Connie Mayer, Albany Law School, Albany, NY
Research Assistant To Commence August 2023

Barclay Damon LLP, Syracuse, NY
Summer Associate May 2023 – Present

- Conduct legal research on various federal issues including diversity of jurisdiction and amending pleadings
- Prepare legal memoranda regarding potential causes of action

Schenectady County District Attorney's Office, Schenectady, NY
Legal Intern June 2022 – May 2023

- Drafted appellate briefs and responses to motions
- Researched and applied case law to address issues on appeal
- Appeared on the record in city court regarding defendants' detainment status

RoseWaldorf PLLC, Albany, NY
Intake Coordinator March 2021 – May 2023

- Opened case files for claims and lawsuits
- Analyzed applicable rules and laws to calculate the due date for pleadings

OTHER EXPERIENCE

Pizza Hut, Clifton Park/Glenville, NY
Shift Manager November 2017 - March 2021

COMPUTER SKILLS

Proficient in LexisNexis, Westlaw, Bloomberg Law, Expert Time, iManage, PCMS, PCLaw, LawManager, IBM SPSS Statistics, Microsoft Office, and Google Suites

BISHOP, CAMERON L. TRANSCRIPT OF RECORD ISSUED: 06/10/2023

Student No. 0586848-0124

ALBANY LAW SCHOOL
80 New Scotland Avenue, Albany, NY 12208
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Fax 518-472-5889

Page 1 of 1

Matriculated: 08/23/2021 Program: JD 3 Year Anticipated Degree Date: 05/24
Concentration(s): Civil Litigation; Tax Law

		CR.HR	GRADE	QPTS
FALL 2021 (08/23/2021 to 12/20/2021)				
CONX PREYH	Contracts	3.0	B+	9.9
CIVP CMAYE	Federal Civil Procedure	4.0	A	16.0
IIJE AHARR	Inter/Intragenerational Jst Sm	1.0	A-	3.7
ILWF AMOLO	Introduction to Lawyering	3.0	A	12.0
TORT PARMS	Torts	4.0	A+	17.2
Averaged: 15.00	Earned: 15.00	Q.Pts: 58.80		
SEM: GPA 3.92 Rank 18/193	CUM: GPA 3.92 Rank 18/194			
SPRING 2022 (01/18/2022 to 05/18/2022)				
	DEAN'S LIST			
CNSL VBONV	Constitutional Law	4.0	A	16.0
CONT PREYH	Contracts	2.0	A-	7.4
CRIM MWETM	Criminal Law	3.0	A-	11.1
ILWS AMOLO	Introduction to Lawyering	3.0	A-	11.1
PROP JROSE	Property	4.0	A-	14.8
Averaged: 16.00	Earned: 16.00	Q.Pts: 60.40		
SEM: GPA 3.78 Rank 23/190	CUM: GPA 3.85 Rank 18/190			
FALL 2022 (08/22/2022 to 12/21/2022)				
	DEAN'S LIST			
DAPL RMERG	CLN:Alb Cnt DA FDPL Classroom	1.0	A+	4.3
FDPL JLCON	CLN:Field Placement	3.0	P	.....
FIRS VBONV	Con Law II: First Amendment	2.0	A	8.0
EVDC MWETM	Evidence	4.0	A+	17.2
HNRS CMAYE	Honors Teaching Fellowship	2.0	CR	.....
FORL AHAYN	National Security Law	2.0	A	8.0
PUBH AWILL	Public Health Law	3.0	A	12.0
Averaged: 12.00	Earned: 17.00	Q.Pts: 49.50		
SEM: GPA 4.13 Rank 6/184	CUM: GPA 3.92 Rank 11/185			
SPRING 2023 (01/16/2023 to 05/17/2023)				
	DEAN'S LIST			
CPAD KSPRO	Criminal Procedure: Adjudicatn	3.0	A+	12.9
LPRF RBRES	Legal Profession	3.0	A	12.0
NYP2 PCONN	New York Practice II	3.0	B+	9.9
PTP2 MWETM	Trial Practice II: Civil	3.0	A	12.0
Averaged: 15.00	Earned: 17.00	Q.Pts: 58.80		
SEM: GPA 3.92 Rank 24/188	CUM: GPA 3.92 Rank 13/188			
TOTALS Averaged: 58.00	Earned: 65.00	Q.Pts: 227.50		

Satisfied Upperclass Writing Requirement

STUDENT IN GOOD STANDING UNLESS OTHERWISE INDICATED

NOT VALID AS OFFICIAL WITHOUT SIGNATURE AND SEAL

FEDJ	MHUTT	Federal Jurisdiction /Practice	3.0	A	12.0
LRME	VBONV	Law Review (Membership)	1.0	CR	.....
LRWT	VBONV	Law Review (Writing)	1.0	CR	.....

ALBANY LAW SCHOOL
80 NEW SCOTLAND AVENUE, ALBANY, NEW YORK 12208-3494
TEL: 518-445-2311 FAX: 518-445-2315 WWW.ALBANYLAW.EDU

June 6, 2023

Re: Application of Cameron Bishop

To Whom it May Concern:

I am pleased to write this letter in support of the application of Cameron Bishop for a clerkship position. I have known Mr. Bishop since the fall of 2021 when he was a first-year law student in my Civil Procedure class. As a second-year law student, Mr. Bishop was invited to participate in the Sponsler Teaching Fellows Program and served as my teaching assistant for Civil Procedure in the fall of 2022 and for Criminal Law in the spring of 2023. Because I have had the pleasure of working with Mr. Bishop as a student and a teacher/mentor to other law students, I have had the opportunity to observe the quality of his work and I believe I am uniquely positioned to describe his professional attributes and qualifications. He is clearly within the top 5% of the students I have taught at Albany Law School.

Mr. Bishop is one of the brightest, hardest-working students I have ever had. As a student in my Civil Procedure class, Mr. Bishop distinguished himself from the very beginning of his law school career by demonstrating an excellent ability to spot relevant issues and analyze the legal and policy implications raised by those issues. He was always well-prepared for class and made a careful and thoughtful analysis of the cases and issues we were discussing. During class discussions, he often asked questions and raised issues that went beyond the cases we were discussing, leading to a richer and more meaningful class discussion. He demonstrated strength in oral communication and excellent analytical skills.

Because of his superior academic performance in his first year of law school, he was invited to participate in the Sponsler Teaching Fellows Program. The Sponsler Teaching Fellows Program is a highly selective academic honors program in which students ranked in the top 10% of their class at the end of their first year of law school are invited to assist in teaching and mentoring in the first-year curriculum. Mr. Bishop was assigned to my Civil Procedure class as a Sponsler Fellow in the fall of 2022 and was so effective that I asked him to continue in his teaching role in my Criminal Law course in the spring of 2023. He was extremely organized and conscientious, providing outstanding guidance and mentoring to the first-year students. He was available on a weekly basis to tutor students individually and organized review sessions periodically throughout both semesters. His presentations were easily understandable and accessible to his students. He provided clear feedback to students on their written work and assisted them with outlining the subject matter and organizing their materials. He was able to

work under pressure and meet every deadline while balancing his full course load, Law Review responsibilities, and Moot Court work. He was invaluable in assisting students in their learning process and those students regularly benefitted from his critical insights.

Throughout the two semesters, I have had many opportunities to observe and review Mr. Bishop's written and oral communications. His critical thinking skills and legal analysis are superior and his writing is thorough, detailed, clear, and precise. His strength in oral communication was demonstrated both in the classroom as a student and as a teaching assistant, and outside the classroom through his participation in Moot Court. Mr. Bishop was a finalist in the Gabrielli Appellate Advocacy Competition and was named Best Oral Advocate in the competition for 2023.

On a personal level, Mr. Bishop is responsible, trustworthy, and dependable. He never missed a deadline or turned in work that was anything but excellent. I recommend Mr. Bishop without reservation. He will bring outstanding written, oral and analytical skills, and a sound work ethic to the position. His exceptional academic record and intellect will make him an asset to your office. If you have any questions about this recommendation, please feel free to contact me as set out below.

Sincerely,

Connie Mayer
Raymond and Ella Smith Distinguished Professor of Law
ALBANY LAW SCHOOL
80 New Scotland Ave | Albany, NY 12208
P: 518.445.2393 | F: 518.445.3281
E-mail: **cmaye@albanylaw.edu**

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing this letter on behalf of a student, Cameron Bishop, who was in my New York Practice II class in the Spring 2023 Semester. Cameron is applying for a clerkship in your chambers.

New York Practice is Albany Law School's comprehensive review of the CPLR, which totals 6 credits. The course, originally designed by Professor David D. Siegel, is the most detailed course offered on the subject of New York Practice and is one of the most demanding courses offered at Albany Law School.

Cameron received a B+ in my New York Practice II course, which was an impressive achievement. Cameron was a second-year student in the class and was competing against third-year students who had already taken New York Practice I. Cameron wisely decided to take New York Practice II in his second year of law school because his schedule would not permit him to take the course in his third year. This required a great deal of preparation because the material covered in New York Practice II builds on knowledge obtained in the New York Practice I course.

Cameron worked very hard to learn the material and proved to be one of the finest students in the class. He demonstrated an admirable work ethic and was always prepared to discuss the detailed procedural issues we covered during class. He participated in almost every class! Therefore, it was no surprise when he received such a high grade in New York Practice II. I look forward to Cameron taking my New York Practice I class this fall.

Cameron's performance in my classes is typical of the high level of performance he achieved throughout his law school career and reflects the enthusiasm he brings to his studies. It is no surprise that he is ranked so highly in his class and is a Subeditor of the Albany Law Review. He also participated in the Domenick L. Gabrielli Appellate Advocacy Moot Court Competition, where he was a Finalist and Best Oral Advocate.

In addition to Cameron's hard work ethic, he is also a very intelligent and cordial person. I believe he possesses all of the skills necessary to be an outstanding law clerk. I clerked for Judge Richard D. Simons at the New York Court of Appeals from 1988 through 1991. During that time, I realized that judges and courts need law clerks who are not only bright, but mature and compatible. I firmly believe that Cameron satisfies all of these qualifications. He would be a strong asset to your chambers.

Please feel free to contact me if you have any questions regarding Cameron.

Thank you for your consideration in this matter.

Respectfully,

Patrick M. Connors
pconn@albanylaw.edu
518-445-2322

ALBANY LAW SCHOOL

80 NEW SCOTLAND AVENUE ALBANY, NEW YORK 12208-3494
TEL: 518-445-3201 FAX: 518-445-2315 WWW.ALBANYLAW.EDU

June 12, 2023

To Whom It May Concern,

On behalf of one of my best students, I write this letter of recommendation in support of his candidacy for a judicial clerkship. By the date of this letter, I have recommended no other candidate for this position and would be hard-pressed to find another student matching Cameron Bishop's qualifications.

Academically, Cameron is exemplary. At Albany Law School, I teach two doctrinal courses, Criminal Law and Evidence, and an upper-level course, Trial Practice. The doctrinal courses examine the fundamental principles taught traditionally at all ABA-accredited law schools (elements of crimes and the Federal Rules of Evidence, respectively). Trial Practice, on the other hand, is an immersive experience where students learn the practical skills of a simulated jury trial. In Evidence, Cameron earned an "A+", the highest grade attainable in law school. In the other courses, he consistently performed with peer-shadowing proficiency, in the solid "A" range.

What sets Cameron apart from his peers is not just grades, however. Outside of the classroom, his unwavering commitment to analyzing complex legal issues, sharpening practical skills, and developing poignant, thought-provoking arguments puts him on another level of engagement. Last semester, Cameron was a semifinalist in the law school's most esteemed competition, the Domenick L. Gabrielli Appellate Advocacy Competition, and tied with another student for best oral advocate. In the final round, which I attended, Cameron had the most polished rhetorical prowess among the competitors, the kind exhibited by only the most seasoned advocates.

This recommendation is without any reservation. If you have any questions about Cameron or this letter, do not hesitate to contact me. I can be reached at 518-445-3201.

Yours sincerely,

Michael C. Wetmore
Visiting Assistant Professor of Law
mwetm@albanylaw.edu

Cameron Bishop
415 Engleman Avenue, Scotia, New York 12302 · cbishop@albanylaw.edu · +1 (518) 859-4771

WRITING SAMPLE

This is my section of my appellate brief I wrote for Albany Law School's Gabrielli Appellate Advocacy Competition, where I was a finalist and won the Best Oral Advocate Award in the competition. The issue in my brief was arguing that the stop and frisk of the defendant, Nicholas Miller, did not violate his Fourth Amendment Rights. The analysis focused on two specific frisks of Mr. Miller's person: (1) the search of Mr. Miller's pant pocket, and (2) the search of his hoodie pocket. The statement of the case, summary of the argument, standard of review, and second argument of the brief sections are omitted as they were written together with my partner in the competition. The argument in this writing sample is exclusively my own writing.

ARGUMENT

I. THE NEW SCOTLAND SUPREME COURT, APPELLATE DIVISION CORRECTLY AFFIRMED THE TRIAL COURT'S DECISION TO DENY THE APPELLANT'S MOTION TO SUPPRESS THE OUNCE OF HEROIN FOUND IN HIS SWEATSHIRT POCKET DURING A SEARCH BY THE POLICE AND THAT SEARCH DID NOT VIOLATE HIS FOURTH AMENDMENT RIGHTS.

The defendant's Fourth Amendment rights were not violated when Officers Schmidt and Bishop reasonably performed a *Terry* stop and frisk on him. The frisk was reasonable under the totality of the circumstances.

It is undisputed that citizens of the United States ("U.S.") have a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Furthermore, "the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth [Amendment]." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The Supreme Court has held that "in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968). This two-pronged analysis requires that:

> First, the investigatory stop must be lawful. That requirement is met in an on-the-street encounter, *Terry* determined, when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense. Second, to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous.

Ariz. v. Johnson, 555 U.S. 323, 326–27 (2009). *See also U.S. v. Robinson*, 846 F.3d 694, 698 (4th Cir. 2017).

As it pertains to whether it was reasonable for the officer to stop an individual, it has been held that "an officer may conduct a brief investigatory stop if he has a **reasonable,**

articulable suspicion that criminal activity is afoot." *U.S. v. Romain*, 393 F.3d 63, 71 (1st Cir. 2004) (citing *Terry*, 392 U.S. at 30) (emphasis added). In this analysis, "the totality of the circumstances—the whole picture—must be taken into account." *U.S. v. Cortez*, 449 U.S. 411, 417 (1981). The key component in looking at the totality of the circumstances is "to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *U.S. v. Arvizu*, 534 U.S. 266, 273 (2002) (citing *Cortez*, 449 U.S. at 417–418). The reasonable suspicion that arose from the totality of the circumstance "must be measured by what the officers knew before they conducted their search." *Fla. v. J.L.*, 529 U.S. 266, 271 (2000). Furthermore, "the showing required to meet this standard is **considerably less demanding** than that required to make out probable cause, [but] the officer nonetheless must possess (and be able to articulate) more than a hunch, an intuition, or a desultory inkling of possible criminal activity." *Romain*, 393 F.3d at 71 (citing *Terry*, 392 U.S. at 27) (emphasis added).

Courts have held that several factors in the totality of the circumstances weigh in favor of the reasonableness of the *Terry* stop, such as the "area's disposition toward criminal activity, [and] the time of night." *U.S. v. Guardado*, 699 F.3d 1220, 1223 (10th Cir. 2012) (citing *Ill. v. Wardlow*, 528 U.S. 119, 124 (2000); *U.S. v. McHugh*, 639 F.3d 1250, 1257 (10th Cir.2011); *U.S. v. Clarkson*, 551 F.3d 1196, 1202 (10th Cir. 2009)). Another factor courts consider is when an individual "matche[s] the tipster's description." *U.S. v. Sims*, 296 F.3d 284, 287 (4th Cir. 2002). Courts also consider the time of the *Terry* stop in relation to when the crime took place, and the distance from the *Terry* stop to where the crime occurred. *See U.S. v. Brown*, 159 F.3d 147, 150 (3d Cir. 1998); *U.S. v. Goodrich*, 450 F.3d 552, 562 (3d Cir. 2006); *U.S. v. Juv. TK*, 134 F.3d 899, 904 (8th Cir. 1998); *U.S. v. Tarrents*, 98 F. App'x 572, 573 (8th Cir. 2004); *U.S. v. Harley*, 682 F.2d 398, 402 (2d Cir. 1982); *U.S. v. Mayo*, 361 F.3d 802, 805–06 (4th Cir.

2004).

After the stop, the officer may search the individual where the "purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable." *Adams v. Williams*, 407 U.S. 143, 146 (1972) (citing *Terry*, 392 U.S. at 30). However, "to proceed from a stop to a frisk (pat down for weapons), the officer must reasonably suspect that the person stopped is armed and dangerous." *Johnson*, 555 U.S. 323. The Supreme Court has defined "reasonable suspicion" as "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. *See also U.S. v. Berry*, 670 F.2d 583, 598 (5th Cir. 1982). Reasonable suspicion for a frisk exists where "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27. However, "[i]n the case of the self-protective search for weapons, [the officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous."' *Sibron v. N.Y.*, 392 U.S. 40, 64 (1968) (citing *Terry* 392 U.S.). Factors that can justify reasonable suspicion includes "the time of day, flight, the high crime nature of the location, furtive hand movements, an informant's tip, a person's reaction to questioning, a report of criminal activity or gunshots, and the viewing of an object or bulge indicating a weapon." *Anderson v. U.S.*, 658 A.2d 1036, 1038 (D.C. 1995) (citing *Williams*, 407 U.S. at 147–48; *Cousart v. U.S.*, 618 A.2d 96 (D.C.1992); *Williamson v. U.S.*, 607 A.2d 471 (D.C.1992); *Gomez v. U.S.*, 597 A.2d 884 (D.C.1991); *Duhart v. U.S.*, 589 A.2d 895 (D.C.1991); *Stephenson v. U.S.*, 296 A.2d 606 (D.C.1972)).

During such a frisk, courts have held that "*Terry* does not in terms limit a weapons search to a so-called 'pat down' search. Any limited intrusion designed to discover guns, knives,

clubs or other instruments of assault are permissible." *U.S. v. Hill*, 545 F.2d 1191, 1193 (9th Cir. 1976). *See also U.S. v. Reyes*, 349 F.3d 219, 225 (5th Cir. 2003); *U.S. v. Baker*, 78 F.3d 135, 138 (4th Cir. 1996); *U.S. v. Hawkins*, 830 F.3d 742, 745 (8th Cir. 2016). Generally, police officers are "authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of [a] stop." *U.S. v. Hensley*, 469 U.S. 221, 235 (1985). An officer's "inability to determine from a pat-down whether [a] pocket of [a] bulky coat contained a weapon, justifie[s] [a] probe of the pocket." *U.S. v. Thompson*, 597 F.2d 187, 191 (9th Cir. 1979). In fact, "the Fourth Amendment permits non-intrusive, reasonable means other than a frisk where . . . the other means are necessary in the circumstances to ensure that the suspect is not armed." *U.S. v. Edmonds*, 948 F. Supp. 562, 566 (E.D. Va. 1996), *aff'd*, 149 F.3d 1171 (4th Cir. 1998), *cert. denied*, 525 U.S. 912 (1998). This "includ[es] reaching into a suspect's coat pocket and lifting a suspect's shirt." *U.S. v. Terry*, 718 F. Supp. 1181, 1187 (S.D.N.Y. 1989), *aff'd*, 927 F.2d 593 (2d Cir. 1991) (citing *Thompson*, 597 F.2d at 191; *Hill*, 545 F.2d at 1193). A search beyond a "pat down" must be "reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man." *Sibron*, 392 U.S. at 65. In reviewing such a search:

> A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, itself, render the search unreasonable."

U.S. v. Sharpe, 470 U.S. 675, 686–87 (1985) (citing *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973); *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976)). *See also Mich. v. Long*, 463 U.S. 1032, 1052 (1983); *U.S. v. Sokolow*, 490 U.S. 1, 11 (1989). Notably, "[t]he question is not

simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize it or to pursue it." *U.S. v. Sanders*, 994 F.2d 200, 204 (5th Cir. 1993). Indeed:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Minn. v. Dickerson, 508 U.S. 366, 375–76 (1993).

In *U.S. v. Hughes*, on September 24, 1992, Detective Robert Malmquist ("Detective Malmquist") "obtain[ed] information from a confidential informant ("C.I.") that a man named 'Lonnie,'" was selling cocaine and "often carried a gun and drove a white Cadillac," and provided Detective Malmquist with Lonnie's address ("the residence"). 15 F.3d 798, 800 (8th Cir. 1994). As a result of this information, Detective Malmquist got a search warrant to search the house the informant proved him with as well as anyone inside. *Id.* Then "[a]fter the search warrant was obtained, the officers observed the residence a number of times over several days looking for the return of the white Cadillac." *Id.*

Five days later, "[o]n September 29, 1992, at approximately 4:00 p.m., Agent Catherine Kaminski and Detective Malmquist noticed a white Cadillac parked in front of the residence under surveillance. A license check revealed that the car was registered to . . . Lonnie Hughes" ("Hughes"). *Id.* Later "[o]n that same day, the confidential informant called [Hughes] and asked him to deliver an ounce of cocaine to him. [Hughes] allegedly told the informant that he had the cocaine, but he would be unable to deliver it and told the informant to come to the . . . residence to buy the drugs." *Id.* Then, a couple of hours later "[a]t 6:00 p.m., the officers returned to the area to execute the warrant [and] observed the white Cadillac still parked in front of the

residence, this time with three people traveling [sic] back and forth, moving things from the residence to the car." *Id.* After seeing this, "[o]ne of the individuals then got into the Cadillac and drove past Agent Kaminski and Detective Malmquist, who were able to identify the driver as Hughes. The officers followed the Cadillac until it pulled into an alley and parked." *Hughes*, 15 F.3d at 800. It was then that Hughes "got out of his car as the officers approached." *Id.*

Because of "knowledge that Hughes had a criminal history of a previous weapons violation, and the [C.I.]'s statement that [Hughes] often carried a gun, the officers performed a pat down search of [Hughes]'s clothing prior to any questioning." *Id.* When "Detective Malmquist conducted the search for weapons, he felt a bulge in appellant's left jacket pocket which turned out to be $2,390 in cash. The pat down search of [Hughes]'s left front trouser pocket revealed small lumps which [Detective] Malmquist believed to be crack cocaine." *Id.* When Detective Malmquist inspected the lumps, he "discovered that these were in fact nine rocks of crack cocaine, five of which were individually wrapped, and weighing a total of 2.5 grams. Appellant was then placed under arrest and a warrant was obtained to search appellant's car." *Id.* The subsequent "search of the trunk revealed 23 grams of crack cocaine and 6 grams of cocaine powder hidden on the underside of a child's car seat. The officers also found a fully-loaded .22 caliber revolver in an overnight bag located in the trunk of the car, next to the booster seat." *Id.* Hughes was thereafter "convicted of possession with intent to distribute cocaine base . . . and with using a firearm during and in relation to a drug trafficking offense." *Hughes*, 15 F.3d at 799.

The Court, in applying *Terry* and its progeny, reviewed whether the "evidence was seized in violation of his Fourth Amendment rights." Specifically, Hughes argued "that the search of [Hughes's] pockets exceeded the scope of a *Terry* frisk for weapons." *Id.* at 802. The

Court, in reviewing this claim, summarized the conduct of Detective Malmquist by stating that "[a]s Detective Malmquist patted down appellant's outer clothing he first discovered a large lump in appellant's front pocket which turned out to be a wad of cash. As he continued to search for weapons he patted [Hughes]'s pants pocket and felt what he 'thought would be crack cocaine.'" *Id.* The Court contrasted between *Dickerson* and found that:

> [I]n the instant case Detective Malmquist testified that when he patted down appellant's pants pocket for weapons he "could feel lumps that [he] thought would be crack cocaine." According to his testimony, Detective Malmquist's first impression was that the object was contraband; there was no further manipulation of the object. Therefore, under *Dickerson*, the officer was entitled to seize the item. We conclude the initial stop, subsequent frisk and eventual seizure of the contraband was in accord with the *Terry* test.

Id.

In this case, the seizure of the heroin from the defendant did not violate his Fourth Amendment rights. Officers Schmidt and Bishop, during their routine patrol on August 10, 2021, "between 5:35 AM and 5:40 AM, the officers received a call that there was a possible suspect in the area that had just robbed a local jewelry store. The officers were given a brief description of the suspect and were told to be on alert." Record on Appeal ("R.A.") at 10.[1] The officers eventually saw the defendant "who fit the description of the robbery suspect. Specifically, the [defendant] was just under six feet tall with an average build and was wearing what law enforcement described as a unique pair of bright orange, yellow, and green Nike sneakers." R.A. at 10. Furthermore, "[w]hen the officers continued to ask questions, [the defendant] refused to answer them." R.A. at 11. It should also be noted that the officers were in a "high crime" area that "was known that drug and black-market sales occurred often in the area." R.A. at 10. Based on the totality of the circumstances, the officers performed a *Terry* frisk

[1] All citations in the form "R.A. at __" are to the Record on Appeal.

on the defendant, who they reasonably believed to be armed and dangerous. *See Cortez*, 449 U.S. at 417. During the frisk, "the officers found in Mr. Miller's pant pocket a bag of sour patch kids, a can of Red Bull, and a receipt for the purchases. When they searched Mr. Miller's sweatshirt pocket, they discovered a total of one ounce of heroin, which had been split into several different bags." R.A. at 11.

As was the case in *Hughes*, the defendant was frisked in search of a weapon, and subsequently drugs were found in his pockets. R.A. at 11. In *Hughes* where following Detective Malmquist's frisk of Hughes, Detective Malmquist "felt a bulge in [Hughes]'s **left jacket pocket** which turned out to be $2,390 in cash" and "[t]he pat down search of appellant's **left front trouser pocke**t revealed small lumps which Officer Malmquist believed to be crack cocaine." *Hughes*, 15 F.3d at 800 (emphasis added). Similarly, here Officers Bishop and Schmidt saw a bulge "weighing down [the defendant's] **pant pocket**," and found only "a bag of sour patch kids, a can of Red Bull, and a receipt for the purchases" in his pant pocket. R.A. at 10-11 (emphasis added). Following the search of the defendant's pant pocket, the officers searched his **sweatshirt pocket** and found "one ounce of heroin, which had been split into several different bags." Since besides the pat down frisk the officers conducted on the defendant "there was no further manipulation of the object . . . under Dickerson, the officer[s] [were] entitled to seize the item[s]" in the defendant's pockets. *Hughes*, 15 F.3d at 802. *See also Terry*, 718 F. Supp. at 1187.

Even if this Court were to find "that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means . . . [that] does not, itself, render the search unreasonable." *Sharpe*, 470 U.S. at 687. The officers reasonably believed the defendant, who was not answering their questions, in a high crime area, at 6:00 a.m., who matched the

description of a robbery suspect who they reasonably believed to be armed and dangerous, and therefore the *Terry* frisk was reasonable. Since "[t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize it or to pursue it," Officers Schmidt and Bishop, even **if** an alternative was available, were not acting unreasonably in failing to recognize it or pursue it. *Sanders*, 994 F.2d at 204.

Officers Schmidt and Bishop did not violate the defendant's Fourth Amendment rights when they performed a *Terry* stop and frisk on him. The stop and frisk were both reasonable under the totality of the circumstances. Even if there were other less intrusive means for the officers to protect the public, the search was still reasonable under the circumstances.

Applicant Details

First Name	**Arlo**
Middle Initial	**B**
Last Name	**Blaisus**
Citizenship Status	**U. S. Citizen**
Email Address	**Arlo.Blaisus@temple.edu**
Address	**Address** Street **5006 Pentridge St. #3** City **Philadelphia** State/Territory **Pennsylvania** Zip **19143** Country **United States**
Contact Phone Number	**4788004436**

Applicant Education

BA/BS From	**Warren Wilson College**
Date of BA/BS	**May 2013**
JD/LLB From	**Temple University--James E. Beasley School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23905&yr=2011**
Date of JD/LLB	**May 15, 2024**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Temple Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Campbell, Giovanni
giovanni.campbell@courts.phila.gov
215-683-7121

Knauer, Nancy
nancy.knauer@temple.edu
215-204-1688

This applicant has certified that all data entered in this profile and any application documents are true and correct.

5006 Pentridge St. #3,
Philadelphia PA, 19143

June 3, 2023

Hon. Judge Juan R. Sánchez
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Judge Sánchez,

I am a second-year law student at Temple University Beasley School of Law, and I am writing to apply for a 2024 clerkship in your chambers. I would be honored to join your team and assist in your essential service to the people of Pennsylvania.

This spring, I interned with the Honorable Judge Giovanni Campbell on the Philadelphia Court of Common Pleas. There, I observed trials, provided legal research on evidentiary issues, and wrote draft opinions on motions in limine. This experience has inspired me to seek a full-time position as a law clerk. I found that directly assisting the judicial process was fascinating and fulfilling work that I want to continue upon completing my legal education.

I am particularly interested in clerking in your chambers because I want to pursue a career litigating in federal court on behalf of U.S. government agencies. Assisting trial proceedings in Judge Campbell's chambers immeasurably deepened my understanding of trial advocacy and the rules of evidence. Clerking in your chamber would be an invaluable opportunity to continue my study of trial strategy and develop the procedural knowledge I will need as a federal trial attorney.

The driving purpose guiding my legal education is my desire to serve. At Temple Law, I have focused on researching how government institutions could better protect civil rights and promote the public interest. My work culminated this spring when I was awarded the first-place prize in the 2023 Constance Baker Motley National Student Writing Competition for a paper arguing that federal law requires state governments to provide voter registration services to housing aid recipients. I have also worked to serve my fellow Temple Law students as president of Temple's American Constitution Society Student Chapter (ACS) by promoting civic engagement and democratic participation. Through ACS, I organized a successful student campaign resulting in Temple Law designating Election Day as a Day of Civic Service with no regularly scheduled classes. This campaign led to my recent selection as a Next Generation Leader by the American Constitution Society.

My resume, writing samples, and transcripts are enclosed. Please contact me at Arlo.Blaisus@Temple.edu or 479-800-4436 if I can provide any additional information supporting my candidacy.

Respectfully,

Arlo Blaisus

ARLO BLAISUS

5006 Pentridge St. #3, Philadelphia PA, 19143 | 479.800.4436 | Arlo.Blaisus@Temple.edu

EDUCATION

Temple University Beasley School of Law — Philadelphia, PA
J.D. Candidate — May 2024
GPA: 3.79 (top 10% of class)
Honors: Temple Law Review Vol. 96, Lead Research Editor, American Constitution Society Next Generation Leader; Dean's List; Law & Public Policy Scholar; Weisman Family Fellowship; Beasley Scholarship
Awards: Constance Baker Motley National Student Writing Competition, 1st Place Prize, 2023
Activities: American Constitution Society Student Chapter; Temple Votes; Outlaw

Warren Wilson College — Asheville, NC
Bachelor of Arts in History and Political Science, *summa cum laude* — May 2013
GPA: 4.0
Honors: Undergraduate History and Political Science Award 2013; Dean's List
Activities: Fine Woodworking Program, Intercollegiate Mountain Biking Team

EXPERIENCE

U.S. Department of Justice, Tax Division — Washington, D.C.
Summer Law Intern Program — June 2023 – August 2023
Legal research and drafting memorandums on issues of civil procedure, tax law, and property law to assist tax enforcement litigation and collection of judgments.

Philadelphia Court of Common Pleas, Trial Division – Criminal — Philadelphia, PA
Law Student Intern for the Hon. Giovanni O. Campbell — January 2023 – May 2023
Observed court proceedings and discussed the legal issues presented to assist Judge Campbell in deciding motions in limine. Conducted legal research and provided advisory memorandums and draft opinions.

American Atheists Legal Center — Cranford, NJ
Law Clerk — August 2022 – December 2022
Supported civil rights litigation through legal research on 1st Amendment issues.

U.S. Department of Housing and Urban Development, Office of the General Counsel — Washington, D.C.
Legal Intern for the Office of Legislation and Regulations — June 2022 – August 2022
Assisted drafting proposed HUD regulations and publication of HUD rules in the Federal Register.

Ozark Natural Foods Cooperative — Fayetteville, AR
Facilities Department Manager — March 2017 – August 2021
Project manager for the construction of a 35,000 sq. ft. retail location. Supervised a team of custodial staff.

Self-Employed — Asheville, NC
Professional Musician — May 2014 – October 2016
Booked, promoted, and performed concerts in over twenty-five states.

PUBLICATIONS

University of Pennsylvania Journal of Constitutional Law, Volume 26 — Forthcoming
Voting Registration and Federal Housing Assistance: A Practical Solution to Increase Democratic Participation

Temple Law Review, Volume 96 — Forthcoming
Defining "Extraordinary": Limiting Principals for the Major Questions Doctrine in West Virginia v. EPA

VOLUNTEER WORK

The American Constitution Society
Student Chapter President — May 2021 – Present
Led a successful campaign to cancel classes on Election Day at Temple Law to promote student civic engagement, resulting in Temple Law designating Election Day, Nov. 8th, 2023, as a Day of Civic Service with no classes.

Temple University

Academic History

916077004 Arlo B. Blaisus
Jun 17, 2023 01:19 pm

This is **not** an official transcript. Courses which are in progress may also be included on this transcript.
Please contact your advisor if all of your transfer credits are not listed below.

Institution Credit Transcript Totals Courses in Progress

Transcript Data

STUDENT INFORMATION

NAME :	Arlo B. Blaisus
STUDENT TYPE:	Continuing Degree Seeking

Curriculum Information

CURRENT PROGRAM	
Juris Doctor	
PROGRAM:	Law--Full Time
COLLEGE:	Law, Beasley School
CAMPUS:	Main
MAJOR AND DEPARTMENT:	Law--Full Time, Law: Beasley School of Law

***Transcript type:ADV Advising Transcript is NOT Official ***

INSTITUTION CREDIT **-Top-**

TERM: 2021 FALL	
TERM COMMENTS:	Semester Notations:
	DCP (Legal Research & Writing I)
	DCP (Contracts)
COLLEGE:	Law, Beasley School
MAJOR:	Law--Full Time
STUDENT TYPE:	First Time Professional
ACADEMIC STANDING: WHAT DOES THIS MEAN?	Not Calculated
ADDITIONAL STANDING: WHAT DOES THIS MEAN?	Dean's List

SUBJECT	COURSE	CAMPUS	LEVEL	TITLE	GRADE	CREDIT HOURS	QUALITY POINTS	START AND END DATES	R	CEU CONTACT HOURS
JUDO	0402	Main	LW	Civil Procedure I Gugliuzza, P	B+	4.000	13.32			

JUDO	0406	Main	LW	Contracts Lipson, J	A	4.000	16.00		
JUDO	0414	Main	LW	Legal Research & Writing Carpenter, L	A-	3.000	11.01		
JUDO	0420	Main	LW	Torts Manners, J	A	4.000	16.00		
JUDO	0437	Main	LW	Intro to Transactional Skills Monroe, A	S	1.000	0.00		

Term Totals (Law)

	ATTEMPT HOURS	PASSED HOURS	EARNED HOURS	GPA HOURS	QUALITY POINTS	GPA
CURRENT TERM:	16.000	16.000	16.000	15.000	56.33	3.76
CUMULATIVE:	16.000	16.000	16.000	15.000	56.33	3.76

Unofficial Transcript

TERM: 2022 SPRING

TERM COMMENTS:	Semester Notations:
	DCP (Legal Research & Writing II)
	DCP (Taxation)
	DCP (Criminal Law I)
COLLEGE:	Law, Beasley School
MAJOR:	Law--Full Time
STUDENT TYPE:	Continuing Degree Seeking
ACADEMIC STANDING: WHAT DOES THIS MEAN?	
ADDITIONAL STANDING: WHAT DOES THIS MEAN?	Dean's List

SUBJECT	COURSE	CAMPUS	LEVEL	TITLE	GRADE	CREDIT HOURS	QUALITY POINTS	START AND END DATES	R	CEU CONTACT HOURS
JUDO	0404	Main	LW	Constitutional Law Rahdert, M	B+	4.000	13.32			
JUDO	0410	Main	LW	Criminal Law I Shellenberger, J	B+	3.000	9.99			
JUDO	0414	Main	LW	Legal Research & Writing Carpenter, L	A-	2.000	7.34			
JUDO	0418	Main	LW	Property Sinden, A	A	4.000	16.00			
JUDO	0600	Main	LW	Taxation Abreu, A	A-	3.000	11.01			

Term Totals (Law)

	ATTEMPT HOURS	PASSED HOURS	EARNED HOURS	GPA HOURS	QUALITY POINTS	GPA

CURRENT TERM:	16.000	16.000	16.000	16.000	57.66	3.60
CUMULATIVE:	32.000	32.000	32.000	31.000	113.99	3.68

Unofficial Transcript

TERM: 2022 SUMMER I

TERM COMMENTS:	Semester Notations:
	DCP (Institutional Decision Making)
COLLEGE:	Law, Beasley School
MAJOR:	Law
STUDENT TYPE:	Continuing Degree Seeking
ACADEMIC STANDING: WHAT DOES THIS MEAN?	

SUBJECT	COURSE	CAMPUS	LEVEL	TITLE	GRADE	CREDIT HOURS	QUALITY POINTS	START AND END DATES	R	CEU CONTACT HOURS
JUDO	W510	Main	LW	Institutional Decision Making Knauer, N	A	3.000	12.00			
JUDO	W910	Main	LW	Law and Public Policy Knauer, N	A	3.000	12.00			

Term Totals (Law)

	ATTEMPT HOURS	PASSED HOURS	EARNED HOURS	GPA HOURS	QUALITY POINTS	GPA
CURRENT TERM:	6.000	6.000	6.000	6.000	24.00	4.00
CUMULATIVE:	38.000	38.000	38.000	37.000	137.99	3.73

Unofficial Transcript

TERM: 2022 FALL

TERM COMMENTS:	Semester Notations:
	DCP (Trial Advocacy I)
COLLEGE:	Law, Beasley School
MAJOR:	Law--Full Time
STUDENT TYPE:	Continuing Degree Seeking
ACADEMIC STANDING: WHAT DOES THIS MEAN?	
ADDITIONAL STANDING: WHAT DOES THIS MEAN?	Dean's List

SUBJECT	COURSE	CAMPUS	LEVEL	TITLE	GRADE	CREDIT HOURS	QUALITY POINTS	START AND END DATES	R	CEU CONTACT HOURS
JUDO	0460	Main	LW	Trial Advocacy I Jacobson, S	S+	2.000	0.00			

JUDO	0540	Main	LW	Evidence Epstein, J	A	3.000	12.00		
JUDO	0905	Main	LW	Temple Law Review Reinstein, R	CR	1.000	0.00		
JUDO	1025	Main	LW	Law and Public Policy II	A	3.000	12.00		
JUDO	P420	Main	LW	Practicum: Civil Rights Knauer, N	S+	3.000	0.00		

Term Totals (Law)

	ATTEMPT HOURS	PASSED HOURS	EARNED HOURS	GPA HOURS	QUALITY POINTS	GPA
CURRENT TERM:	12.000	12.000	12.000	6.000	24.00	4.00
CUMULATIVE:	50.000	50.000	50.000	43.000	161.99	3.77

Unofficial Transcript

TERM: 2023 SPRING

TERM COMMENTS:	Semester Notations:
	DCP (Civil Procedure II)
	Tie-BP; DCP (Local Government Law)
COLLEGE:	Law, Beasley School
MAJOR:	Law--Full Time
STUDENT TYPE:	Continuing Degree Seeking
ACADEMIC STANDING: WHAT DOES THIS MEAN?	Not Calculated
LAST ACADEMIC STANDING: WHAT DOES THIS MEAN?	Not Calculated

SUBJECT	COURSE	CAMPUS	LEVEL	TITLE	GRADE	CREDIT HOURS	QUALITY POINTS	START AND END DATES	R	CEU CONTACT HOURS
JUDO	0461	Main	LW	Trial Advocacy II Leckman, T	S	3.000	0.00			
JUDO	0517	Main	LW	Civil Procedure II Jacobsen, K	A	2.000	8.00			
JUDO	0574	Main	LW	Local Government Law Feder, R	A+	3.000	12.00			
JUDO	0905	Main	LW	Temple Law Review Little, L	CR	2.000	0.00			
JUDO	P470	Main	LW	Practicum: Criminal Law Epstein, J	S+	3.000	0.00			

Term Totals (Law)

	ATTEMPT HOURS	PASSED HOURS	EARNED HOURS	GPA HOURS	QUALITY POINTS	GPA
CURRENT TERM:	13.000	13.000	13.000	5.000	20.00	4.00

CUMULATIVE:	63.000	63.000	63.000	48.000	181.99	3.79

Unofficial Transcript

TRANSCRIPT TOTALS (LAW) -Top-

	ATTEMPT HOURS	PASSED HOURS	EARNED HOURS	GPA HOURS	QUALITY POINTS	GPA
TOTAL INSTITUTION:	63.000	63.000	63.000	48.000	181.99	3.79
TOTAL TRANSFER:	0.000	0.000	0.000	0.000	0.00	0.00
OVERALL:	63.000	63.000	63.000	48.000	181.99	3.79

Unofficial Transcript

COURSES IN PROGRESS -Top-

TERM: 2023 FALL	
COLLEGE:	Law, Beasley School
MAJOR:	Law--Full Time
STUDENT TYPE:	Continuing Degree Seeking

SUBJECT	COURSE	CAMPUS	LEVEL	TITLE	CREDIT HOURS
JUDO	0400	Main	LW	Administrative Law	3.000
JUDO	0416	Main	LW	Professional Responsibility	2.000
JUDO	0508	Main	LW	Corporations	3.000
JUDO	0855	Main	LW	Introduction to Public Interest Law	3.000
JUDO	5045	Main	LW	Pennsylvania Legal Research	1.000

Unofficial Transcript

June 5, 2023
Hon. Juan Sanchez
Chief Judge, United States Court for the Eastern District of Pennsylvania

Dear Judge Sanchez:

Mr. Blaisus is an extraordinary candidate for law clerk of the United States Courts. Beyond academic excellence, Mr. Blaisus offers exceptional analytical, research and writing abilities. This skillset is enhanced by his sound judgement, maturity and a breadth of knowledge that is rare for his stage of legal education.

Mr. Blaisus interned with my office in the Spring of 2023, with the general duties of an on-site law clerk. I preside over major jury trials involving serious criminal charges in the Court of Common Pleas, Philadelphia. Mr. Blaisus observed proceedings, served as a research assistant, and participated in judicial analysis of various topics. Issues often arose that were complex or nuanced, which called for sound reasoning and a thorough understanding of the Rules of Evidence. On every occasion, Mr. Blaisus readily identified the principal issues as well as latent details. Significantly, he was able to address them comprehensively, often in real time. Additionally, Mr. Blaisus rapidly produced high-quality legal memoranda that was very useful to my judicial functions.

I have worked closely with dozens of interns during my nine years as a trial judge. As chair and coordinator of our judicial district's summer internship program for two years, I peripherally supervised two hundred more. These experiences have helped me to assess an intern's understanding of the trial process generally, and the Rules of Evidence in particular. I firmly believe that Arlo Blaisus is the best suited among them all to serve as a law clerk in the United States Courts.

In sum, Mr. Blaisus consistently demonstrates exceptional talents that are far beyond his stage in the legal profession. His maturity, diverse academic and life experiences, and breadth of knowledge are rich additions to his skillset. I recommend him highly, and would be happy to answer any questions you may have.

Most Sincerely Yours,

Hon. Giovanni O. Campbell.

Giovanni Campbell - giovanni.campbell@courts.phila.gov - 215-683-7121

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write this letter in support of the clerkship application of Arlo Blaisus. I recommend Mr. Blaisus enthusiastically and without reservation for this position. I have had Mr. Blaisus in an exam course, a research paper course, and a serial writing paper course. In two of those courses, students were required to prepare a formal presentation of their findings. Accordingly, I am extremely familiar with his research and writing skills, oral advocacy, and classroom participation. In all three instances, Mr. Blaisus excels.

A quick glance at Mr. Blaisus' resume will reveal that he is an extremely talented and accomplished law student. However, there is one entry on his resume that I think warrants a more detailed explanation. I have been working with Mr. Blaisus since his first year of law school when he applied for our highly prestigious and competitive Law & Public Policy (L&PP) Program for students who are interested in pursuing careers in public service. As a L&PP Scholar, Mr. Blaisus secured an internship his 1L summer with the U.S. Department of Health and Human Services and wrote an excellent policy paper on improving voter registration efforts titled: Voting Registration and Federal Housing Assistance: A Practical Solution to Increase Democratic Participation. His paper was so well written and extensively researched that I urged him to submit his paper to the annual meeting of the Law & Society Association (LSA), which is an interdisciplinary and international organization. I was not at all surprised when Mr. Blaisus' paper was selected for the conference, and I am proud to report that he will have the opportunity to present his paper at the annual LSA meeting in San Juan, Puerto Rico later this month on a panel that includes law professors and policy makers from the United States and beyond.

There is much to recommend Mr. Blaisus for a clerkship, including his stellar GPA, excellent legal research and writing skills, and his strong commitment to public service. In addition, he is very well respected by his peers and has distinguished himself as a campus leader. In his capacity as President of the Temple Chapter of the American Constitution Society, Mr. Blaisus spearheaded an initiative to have the Law School cancel all classes on Election Day and engage students in election integrity efforts. Mr. Blaisus spoke with me early on about his plan to petition the administration to cancel classes. Admittedly, I was cautious in my encouragement because I knew how difficult it is to change the academic calendar given my past experience serving as Associate Dean. Mr. Blaisus was undeterred and unwavering in his commitment. He embarked on a well-crafted campaign that involved faculty, administrators, students, and local non-partisan election watchdogs. Mr. Blaisus partnered with the election watchdog organizations to secure training opportunities for law students. He then worked with faculty and administrators to draft a persuasive argument in favor of cancelling classes. By the time the proposal was presented to the faculty, Mr. Blaisus had already laid the groundwork for an easy victory. He also undertook the responsibility to report back to the faculty with information about how many students actually participated in election-related activities. The hope is that this one-year pilot program will become a permanent commitment on the part of the Law School to encourage students to get involved in election integrity efforts.

In short, Mr. Blaisus is an exceptional candidate for a clerkship. In my thirty plus years of law teaching, I have rarely encountered a student with such enthusiasm for the law and strong commitment to public service. With his grades and accomplishments, Mr. Blaisus could easily have secured a position as a summer associate at a large firm, but he elected instead to pursue a position this summer with the U.S. Department of Justice. I know that Mr. Blaisus would be incredibly honored to be selected as a federal judicial clerk and that he would consistently exceed expectations. Please do not hesitate to contact me if there are any questions concerning his qualifications or abilities.

Sincerely,

Nancy J. Knauer

SHELLER PROFESSOR OF PUBLIC INTEREST LAW

DIRECTOR, LAW & PUBLIC POLICY PROGRAM

[This writing sample includes the introduction and a portion of the legal analysis from a law review comment I wrote as a staff editor on Temple Law Review. The background and conclusion sections have been omitted for brevity. This comment is pending publication at the Temple Law Review, but this draft has not been edited by anyone other than me]

I. INTRODUCTION

The field of administrative law is facing a moment of unprecedented upheaval. For almost forty years, *Chevron v. NRDC*[1] has been the central pillar of administrative law, guiding the interpretation of congressional acts by federal executive agencies.[2] The *Chevron* doctrine has promoted good governance and democratic accountability by directing judges to defer to the policy expertise of federal agencies and providing a workable test for analyzing administrative law cases.[3] *Chevron's* influence is waning, though, driven by a growing skepticism at the Supreme Court of the motives and the very existence of administrative agencies.[4] This skepticism recently coalesced in the new major questions doctrine (Major Questions), which threatens to undercut *Chevron* and hobble the federal government's ability to confront the complex challenges America faces in the 21st century.[5]

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[1] Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).
[2] *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 912 (2017) ("[O]n every single working day of the year, there exists in the employ of the federal government a judge, an executive officer, or a legislator who expressly invokes or formulates policy premised on Chevron.").
[3] *See* Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L. Q. 351, 351–52 (1994) ("The practice of deferring to executive interpretations of statutes performs many valuable functions: it allows policy to be made by actors who are politically accountable; it draws upon the specialized knowledge of administrators; it injects an element of flexibility into statutory interpretations; and it helps assure nationally uniform constructions.").
[4] *See* Nathan Richardson, *Deference Is Dead (Long Live Chevron)*, 73 RUTGERS U. L. REV. 441, 523 (2021) (describing *Chevron*'s decline as driven by a "wider ideological project skeptical of administrative authority").
[5] *See id.* at 504 (noting that "*Chevron* empowers agencies to interpret statutes more boldly; a weakened, narrowed, and muddied Chevron does the reverse. Agencies might react to the decline of deference by interpreting statutes more narrowly or by not regulating at all in areas of statutory ambiguity.").

In 2022, the landmark case *West Virginia v. EPA*[6] codified the shift from judicial deference to skepticism of administrative agencies.[7] For the first time, a Supreme Court majority explicitly held that the major questions doctrine—not *Chevron*—governed the legality of a federal agency rule.[8] Now, when Major Questions applies, important administrative actions are inherently "suspect," and the issuing agency must point to "clear congressional authorization" to regulate in their chosen manner.[9] However, *West Virginia* limited the doctrine to "certain extraordinary cases," leaving *Chevron* intact "in the ordinary case."[10]

Federal courts now face an avalanche of Major Questions claims with little guidance on when the new doctrine should apply instead of *Chevron*.[11] How broadly lower courts choose to interpret the "extraordinary cases" limitation in *West Virginia* will have sweeping ramifications.[12] *Chevron* lets agencies develop new solutions to evolving problems.[13] The major questions doctrine aims to thwart federal agency action, directing judges to look askance at new or creative solutions.[14] *Chevron* encourages the political branches of government—not the

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[6] West Virginia v. EPA, 142 S. Ct. 2587 (2022).
[7] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).
[8] West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022); all previous uses of the term "major questions doctrine" by supreme court Justices were in dissents and concurrences. *See, e.g.*, Paul v. United States, 140 S. Ct. 342, 342 (2019) (J. Kavanaugh concurring).
[9] West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022) (quoting Gonzales v. Oregon, 546 U.S. 243, 267 (2006); *See also* Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014).
[10] West Virginia v. EPA, 142 S. Ct. 2587, 2608–09 (2022); see also *infra*, section III.A (discussing the implications of the *West Virginia's* failure to cite *Chevron*).
[11] See *infra*, section III.B.
[12] *See* Edwin E. Huddleson, *Chevron Under Siege*, 58 U. LOUISVILLE L. REV. 17, 20 (2019) (noting that an embrace of the major questions doctrine by the Supreme Court could "dramatically change the status quo and result in invalidating many…agency rules").
[13] *See* Merrill, *Textualism*, *supra* note 3, at 351–52 ("[D]eferring to executive interpretations of statutes performs many valuable functions: it allows policy to be made by actors who are politically accountable; it draws upon the specialized knowledge of administrators; it injects an element of flexibility into statutory interpretations; and it helps assure nationally uniform constructions.").
[14] *See* Lisa Heinzerling, The Power Canons, 58 WM. & MARY L. REV. 1933, 1938 (2017) (describing Major Questions cases as part of a "judicial agenda hostile to a robust regulatory state").

unelected judiciary—to set public policy.[15] The major questions doctrine makes ill-equipped federal courts the arbiters of public policy decisions.[16] Broad applications of the major questions doctrine threatens to hold federal policy hostage to innumerable legal challenges, resulting in the massive waste of taxpayer dollars and governmental paralysis.[17] Narrow applications of the major questions doctrine could preserve the beneficial effects of *Chevron*.[18]

Despite the sweeping potential consequences of Major Questions, the Supreme Court has never adequately instructed lower courts when it applies.[19] *West Virginia* did little to clarify the situation;[20] the first three circuit courts to cite *West Virginia* took drastically different approaches.[21] The chaotic Major Questions analysis by lower courts after *West Virginia* further

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[15] *See* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 866 (1984) ("The responsibilities for assessing the wisdom of …policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'") (quoting *TVA* v. *Hill*, 437 U.S. 153, 195 (1978)).

[16] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2644 (2022) ("The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy.") (J.'s Kagan, Breyer and Sotomayor dissenting); *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts.").

[17] Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 266 (2022) ("Major questions challenges will load the Court's docket for years to come."); *see also* United States v. Mead Corp., 533 U.S. 218, 250 (2001) (describing the consequences of narrowing *Chevron* as "a recipe for uncertainty, unpredictability, and endless litigation") (J. Scalia dissenting).

[18] *See* Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 359 (2016) (proposing that the major questions doctrine could serve as a "safety valve" to prevent *Chevron* from getting over turned).

[19] *See* Kent Barnett and Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 149 (2017) (noting that the Supreme Court has "not provide[d] clear guidance to lower courts on how to apply the new major questions doctrine."); Nicholas R. Bednar, *The Clear-Statement Chevron Canon*, 66 DEPAUL L. REV. 819, 856 (2017) ("The Supreme Court has never articulated how reviewing courts should identify 'extraordinary cases' with any particularity, preferring an 'I know it when I see it' attitude...."); Jonathan Skinner-Thompson, *Administrative Law's Extraordinary Cases*, 30 DUKE ENVTL. L. & POL'Y F. 293, 294 (2020) (noting that the authors are "befuddled" by the application of the doctrine).

[20] *See* Sohoni, *The Major Questions Quartet*, *supra* note 17, at 266 (describing *West Virginia* as a "rain check").

[21] *Compare* Georgia v. President of the United States, 46 F.4th 1283, 1314 (11th Cir. 2022) *and* Loper Bright Enters. v. Raimondo, 45 F.4th 359, 364 (D.C. Cir. 2022) *with* Wash. All. of Tech. Workers v. United States Dep't of Homeland Sec., 50 F.4th 164, 206 (D.C. Cir. 2022) (judge Henderson dissenting).

heightens the importance of clarifying the doctrine.[22]

This Comment proposes three reasons why *West Virginia's* repeated use of the phrase "extraordinary cases" to describe Major Questions creates a clear limiting principle for the doctrine. First, the Supreme Court uses "extraordinary case" to mean an unusual exception to the general rule which must be applied sparingly.[23] As Justice Kennedy recently noted, "it must be understood that extraordinary cases are presented only in the rarest circumstances."[24] Second, the Supreme Court consistently reminds lower courts that "exception[s] must be narrowly construed; otherwise, the exception will swallow the rule."[25] Accordingly, courts must apply Major Questions only in cases that can be limited to rare factual situations and will not lead to Major Questions becoming the default doctrine in administrative law.[26] Third, the "extraordinary cases" limitation provides lower courts with much-needed workable guidance in incorporating Major Questions into administrative law jurisprudence.[27] For these three reasons, federal courts must limit the major questions doctrine to those "few and unusual cases" which are truly "extraordinary."[28] Doing so will preserve judicial resources and maintain the predictable

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[22] *See, e.g.*, Georgia v. President of the United States, 46 F.4th 1283, 1314 (11th Cir. 2022) (speculating that "[a]lthough the major questions doctrine has never been applied to an exercise of proprietary authority and has never been applied to the exercise of power by the President, I will assume that the doctrine does apply") (Judge Anderson concurring in part & dissenting in part); Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec., 50 F.4th 164 n.11 (D.C. Cir. 2022) (speculating that the "implication of [*West Virginia*] is that the major questions inquiry appears to be a threshold question to *Chevron* analysis") (judge Henderson concurring in part and dissenting in part).
[23] *See, e.g.*, Petrella v. MGM, 572 U.S. 663, 676 n.12 (2014) (The "application of laches should be 'extraordinary,' confined to 'few and unusual cases'"); Calderon v. Thompson, 523 U.S. 538, 558 (1998) ("The miscarriage of justice standard…is limited to the most rare and extraordinary case."); Roberts v. United States Dist. Court, 339 U.S. 844, 845 (1950) ("Mandamus is an extraordinary remedy, available only in rare cases.").
[24] Perdue v. Kenny A., 559 U.S. 542, 561–62 (2010) (J. Kennedy concurring).
[25] Bernal v. Fainter, 467 U.S. 216, 222 n.7 (1984).
[26] See *infra*, Section III.A.2.
[27] See *infra*, Part III.A.
[28] *See* Petrella v. MGM, 572 U.S. 663, 676 n.12 (2014) (noting that "application of laches should be 'extraordinary,' confined to 'few and unusual cases'")

application of law that the federal government requires to function effectively.[29]

[Sections Omitted]

A. The "Extraordinary Cases" Limitation to the Major Questions Doctrine

West Virginia emphatically placed the distinction between extraordinary and ordinary cases at the heart of the major questions doctrine.[30] The court repeatedly emphasized this language, describing the major questions doctrine as applying in "extraordinary cases" three separate times and repeatedly contrasting Major Questions with "ordinary circumstances."[31]

First, Roberts states that "[i]n the ordinary case…context has no great effect" in determining administrative law issues, but "our precedent teaches that there are 'extraordinary cases' that call for a different approach."[32] Roberts returns to this point later in the analysis, stating that "the key case in this area, *Brown & Williamson*, . . . could not have been clearer: In extraordinary cases . . . there may be reason to hesitate before accepting a reading of a statute that would, under more ordinary circumstances, be upheld." [33] Roberts is correct on this point; *Brown & Williamson* explicitly stated that it was "hardly an ordinary case."[34] In fact, both the majority and dissenting opinions in *West Virginia* agreed that *Brown & Williamson*— which originated the "extraordinary cases" limitation—was the key case in the development of the

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[29] *see* Kathryn M. Baldwin, *Endangered Deference: Separation of Powers and Judicial Review of Agency Interpretation*, 92 ST. JOHN'S L. REV. 91, 97, 108 (2018) (arguing that "the growing complexity and technicality of the administrative state requires an executive-legislative blend to nimbly create and enforce the rules, guidelines, and regulations for a functioning modern government" and that the major questions doctrine undercuts government functions by "infring[ing] on the power of the legislative and executive branches to make and determine policy.").
[30] *See West Virginia*, 142 S. Ct. at 2587, 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).
[31] *West Virginia*, 142 S. Ct. at 2608–09 (2022) (quoting *Brown & Williamson* , 529 U. S. at 159); *see also West Virginia*, 142 S. Ct. at 2609 (applying the "extraordinary cases" language to *Utility Air*, even though that language did not appear in that opinion).
[32] West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022) (quoting *Brown & Williamson*, 529 U.S. at 159).
[33] *West Virginia*, 142 S. Ct. at 2608 (first quoting *id.* at 2634 (J.'s Kagan, Breyer, and Sotomayor Dissenting) second quoting *Brown & Williamson*, 529 U.S. at 159) (internal quotations omitted).
[34] *Brown & Williamson*, 529 U.S. at 159.

major questions doctrine.[35] The heavy emphasis on this ordinary vs. extraordinary distinction throughout *West Virginia* can only be interpreted as a deliberate effort to place a limiting principle on the major questions doctrine.

The "extraordinary cases" limitation also appears in *King* in the crucial analytical step where the Court separated Major Questions from *Chevron*.[36] *King* is especially important because it is the Court's only explanation of the relationship between the two doctrines.[37] Further, *King* added a definitive numerical comparison between the two doctrines—*Chevron* applies "often," but Major Questions applies only in "extraordinary cases."[38]

The numerical comparison between extraordinary and ordinary cases indicated by *West Virginia*, *King*, and *Brown & Williamson* fits with the Court's consistent use of the phrase "extraordinary cases." The term "extraordinary case" appears in Supreme Court jurisprudence in many contexts to indicate a rare exception to a general rule. In *Petrella v. MGM*, both the majority and the dissent agreed that the doctrine of laches "should be extraordinary" and "confined to few and unusual cases."[39] Similarly, *Roberts v. United States Dist. Court* noted that "[m]andamus is an extraordinary remedy, available only in rare cases."[40] *Salinas v. United States* held that legislative history only justifies a departure from the statutory text in "rare and exceptional circumstances" with "the most extraordinary showing of contrary intentions."[41]

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[35] *West Virginia*, 142 S. Ct. at 2609, 2634 (2022); *see also Brown & Williamson*, 529 U. S. at 159 ("This is hardly an ordinary case.").
[36] King v. Burwell, 576 U.S. 473, 485 (2015) (quoting *Brown & Williamson* 529 U.S. at 159).
[37] *See* Barry Smitherman, *From Chevron to the Clean Power Plan: Is the Doctrine of Agency Deference About to End?*, 13 TEX. J. OIL GAS & ENERGY L 47, 60 (2018) ("In writing the majority opinion in *King v. Burwell*, Chief Justice Roberts, after reviewing the principle of *Chevron* deference and the two-prong test, essentially discards *Chevron*."); *see also* Griffith & Proctor, *supra* note 386, at 700 (discussing the ambiguity in the relationship between *Chevron* and Major Questions).
[38] *King*, 576 U.S. at 485 (quoting *Brown & Williamson* 529 U.S. at 159).
[39] Petrella v. MGM, 572 U.S. 663, 676, n. 12 (2014) (quoting *Id.* at 700) (J.'s Breyer, Roberts, and Kennedy dissenting) (internal quotations omitted).
[40] Roberts v. United States Dist. Court, 339 U.S. 844, 845 (1950)
[41] Salinas v. United States, 522 U.S. 52, 57 (1997) (first quoting United States v. Albertini, 472 U.S. 675, 680 (1985) then quoting Ardestani v. INS, 502 U.S. 129, 135 (1991)).

These cases are representative of the Supreme Court's consistent usage of "extraordinary" to mean "rare," dating to the 1800s.[42]

The Supreme Court's usage fits precisely with the common meaning of "extraordinary." Black's Law Dictionary defines "extraordinary" as "[b]eyond what is usual, customary, regular, or common" and "of, relating to, or involving a legal proceeding or procedure not normally required or resorted to."[43] The Eight Circuit reached a similar conclusion when defining the phrase "extraordinary case" in a set of sentencing guidelines.[44] The court cited several dictionaries defining the phrase as "more than ordinary," "going beyond what is usual, regular, common, or customary," "exceptional to a very marked extent," "remarkable," "uncommon," or "rare."[45] The court concluded that under the sentencing guidelines, "extraordinary case…means a situation that is extremely rare and highly exceptional" and chastised the district court for adopting a definition "so broad that it swallows the 'ordinary' case."[46]

Supreme Court Justices have also often expressed concerns that courts will dilute the meaning of "extraordinary" by applying it too lightly. In *Caperton v. A. T. Massey Coal Co.*, Justices Roberts, Scalia, Thomas, and Alito—all proponents of the major questions doctrine—dissented to criticize the majority for being too quick to make an exception in an "extraordinary

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[42] *See* United States v. Gooding, 25 U.S. (12 Wheat.) 460, 479 (1827) ("[I]t is not wholly incompetent for the Court to entertain such questions during the trial, in the exercise of a sound discretion. It should, however, be rarely done, and only under circumstances of an extraordinary nature."); *see also, e.g.*, Ex Parte Fahey, 332 U.S. 258, 259 (1947) ("Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies….they are reserved for really extraordinary causes."); W. Airlines, Inc. v. Int'l Bhd. of Teamsters, 480 U.S. 1301, 1304–05 (1987) (holding that "this situation presents one of those rare, extraordinary circumstances in which request for a stay before the Court of Appeals is not required"); Davis v. Scherer, 468 U.S. 183, 201 (1984) (listing the "rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing").
[43] *Extraordinary*, *Black's Law Dictionary* (11th ed. 2019).
[44] United States v. Honken, 184 F.3d 961, 969 (8th Cir. 1999).
[45] *Id.* (first quoting *Webster's Third New International Dictionary*, 807 (1993) then quoting *Black's Law Dictionary*, 527 (5th ed. 1979)).
[46] United States v. Honken, 184 F.3d 961, 970 (8th Cir. 1999).

situation."[47] The majority held that campaign contributions to a judge were so "extraordinary" that the Constitution required the judge's recusal.[48] The dissent predicted that "all future litigants will assert that their case is *really* the most extreme thus far" and claim that they needed an exception due to the extraordinary circumstances.[49]

Perdue v. Kenny A provides an insightful discussion of "extraordinary cases."[50] Federal law allows trial judges to award attorney's fees in "extraordinary circumstances," but the general rule is that each party pays their own fees.[51] The Court reversed an award of attorney's fees because there was not sufficient evidence that the case was truly extraordinary.[52] Justice Kennedy concurred to highlight the importance of being objective when labeling a case "extraordinary." Kennedy observed that "[w]hen immersed in a case, lawyers and judges find within it a fascination, an intricacy, an importance that transcends what the detached observer sees," leading the case to "seem extraordinary to its participants."[53] However, objectively, "it must be understood that extraordinary cases are presented only in the rarest circumstances."[54]

Justice Kennedy's admonishment to think objectively about what cases are *actually* extraordinary is especially prescient in the context of the major questions doctrine. Industries are most familiar with the regulations affecting their businesses, naturally viewing those regulations

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[47] Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 899 (2009) (J.'s Roberts, Scalia, Thomas, and Alito dissenting).
[48] *Id.* at 886–87. The majority felt confident, though, that their holding could be "confined to rare instances." *Id.* at 890.
[49] *Id.* at 899 (emphasis in original) (J.'s Roberts, Scalia, Thomas, and Alito dissenting). To illustrate this point the dissent pointed to *United States v. Halper*, 490 U.S. 435 (1989), which created an exception in rare double jeopardy cases, but had to be overturned just eight years later because "[t]he novel claim that we had recognized in *Halper* turned out not to be so 'rare' after all." *Id.* at 900
[50] 559 U.S. 542, 560 (2010) (J. Kennedy concurring).
[51] *See* Perdue v. Kenny A., 559 U.S. 542, 550 (2010) (discussing 42 U.S.C. § 1988).
[52] *Id.* at 558.
[53] *Id.* at 560 (J. Kennedy concurring).
[54] *Id.*

as imperative.[55] *West Virginia* will doubtlessly set off a stampede of litigants "assert[ing] that their case is *really* the most extreme thus far."[56] However, *West Virginia's* clear limitation of the major questions doctrine to "extraordinary cases" should cause judges to view Major Questions claims more skeptically the more often they are told that some obscure federal regulation has "far-reaching consequences that implicate the major questions doctrine."[57] Instead, Judges must limit Major Questions claims to "the rarest circumstances."[58]

B. Keeping the Exception from Swallowing the Rule

Limiting Major Questions claims to truly extraordinary cases takes on additional importance when considering the well-known principle that exceptions must not be allowed to swallow the general rule.[59] Supreme Court case law is overflowing with reminders to interpret exceptions narrowly to preserve their exceptional status.[60] By distinguishing between "ordinary" cases and the "extraordinary cases" where the major questions doctrine applies,[61] *West Virginia* designated the major questions doctrine as an exception to the general rule. Lower courts must prevent the exception from swallowing the rule by rejecting Major Questions claims that would

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[55] *See, e.g.,* United States v. Empire Bulkers Ltd., No. 21-126, 2022 U.S. Dist. LEXIS 151817, at *4 (E.D. La. Aug. 24, 2022) (alleging that a Coast Guard regulation requiring oceangoing ships exceeding 400 gross tons to maintain an Oil Record Book has "far-reaching consequences that implicate the major questions doctrine").
[56] *Caperton*, 556 U.S. at 899 (emphasis in original) (J.'s Roberts, Scalia, Thomas, and Alito dissenting).
[57] *Empire Bulkers*, U.S. Dist. LEXIS 151817, at *4.
[58] *Perdue*, 559 U.S. at 560 (J. Kennedy concurring).
[59] *See, e.g.,* Bernal v. Fainter, 467 U.S. 216, 222 n.7 (1984) ("We emphasize, as we have in the past, that the political-function exception must be narrowly construed; otherwise the exception will swallow the rule and depreciate the significance that should attach to the designation of a group as a 'discrete and insular' minority for whom heightened judicial solicitude is appropriate."
[60] *See, e.g.,* City of L.A. v. Patel, 576 U.S. 409, 424 (2015) ("To classify hotels as pervasively regulated would permit what has always been a narrow exception to swallow the rule."); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 655 (2001) (holding that "a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection. If it did, the exception would swallow the rule"); Cuomo v. Clearing House Ass'n, L.L.C., 557 U.S. 519, 530 (2009) ("The exception could not possibly exempt that manner of exercising visitation, or else the exception would swallow the rule."); Warger v. Shauers, 574 U.S. 40, 52–53 (2014) ("[I]f Warger's understanding of the 'extraneous' information exception were accepted" the "'extraneous' information exception would swallow much of the rest of Rule 606(b)…"); Sosa v. Alvarez-Machain, 542 U.S. 692, 702 (2004) ("The potential effect of this sort of headquarters analysis flashes the yellow caution light" because it "threatens to swallow the foreign country exception whole.").
[61] West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022) (quoting *Brown & Williamson* , 529 U. S. at 159).

erode the doctrine's status as an exception.

Bailey v. United States[62] illustrates the "exception swallows the rule" principle in a context that parallels the major questions doctrine.[63] As a general rule, the 4th Amendment requires police to establish probable cause before seizing a person, but *Michigan v. Summers* allowed an exception when police detain the occupants of premises while executing a search warrant.[64] *Bailey* reversed a Second Circuit case which expanded the *Summer* exception after engaging in an "open-ended balancing" inquiry into the needs of law enforcement.[65] Justice Scalia noted that "[i]t bears repeating that the general rule is that Fourth Amendment seizures are reasonable only if based on probable cause" and that if courts began using multifactor balancing tests, the "protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases."[66] Scalia noted that "[r]egrettably, this Court's opinion in *Summers* facilitated the Court of Appeals' error here by setting forth a smorgasbord of law-enforcement interests assertedly justifying its holding. . . . We should not have been so expansive."[67]

Justice Scalia's concerns in *Bailey* parallel the situation facing lower courts interpreting the major questions doctrine. Major Questions is the exception to the general rule in administrative law cases, but Major Questions cases have justified their holdings with a smorgasbord of conflicting facts and considerations.[68] If lower courts adopt multifactor balancing tests to identify Major Questions, the extraordinary status of the doctrine "could all too easily disappear in the consideration and balancing of the multifarious circumstances presented

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[62] 568 U.S. 186 (2013)
[63] *See* Bailey v. United States, 568 U.S. 186, 205 (2013) (J.'s Scalia, Ginsburg, and Kagan concurring).
[64] *See* Bailey v. United States, 568 U.S. 186, 192–93 (2013).
[65] *See id.* at 204 (J.'s Scalia, Ginsburg, and Kagan concurring).
[66] *Id.* at 204–05 (first quoting Dunaway v. New York, 442 U.S. 200, 213 (1979) then quoting Michigan v. Summers, 452 U.S. 692, 705 (1981)) (internal quotations removed)
[67] *Id.* at 205 (J.'s Scalia, Ginsburg, and Kagan concurring).
[68] *See* Sohoni, *The Major Questions Quartet*, *supra* note 17, at 266.

by different cases."[69] Instead, courts must prevent the major questions doctrine from swallowing the general rule by rejecting Major Questions claims which will expand the doctrine.

Applications of Major Questions by lower courts are already demonstrating how undisciplined applications of the doctrine will lead to the exception swallowing the rule. For example, *Georgia v. President of the United States* expands the major questions doctrine in at least two ways. First, the court assumed—with no analysis at all—that the major questions doctrine applies to congressional delegations to the President, as well as to administrative agencies.[70] This expansion could open new avenues for bringing Major Questions challenges against other Presidential actions, such as military decisions. Second, Presidents have routinely used the Procurement Act to require federal contractors to adopt policies similar to the vaccine mandate at issue, such as antidiscrimination policies, wage and price standards, and providing paid sick leave for employees.[71] All of these policies have been upheld as lawful uses of the Procurement Act, but now they are all open to fresh challenges under the major questions doctrine. [72] These policies cannot all fit the definition of "extraordinary" because there are too many similar instances based on the same statutory text.[73] The clear conclusion is that *Georgia v. President of the United States* violated *West Virginia* by failing to consider whether its holding could be limited to "extraordinary cases."[74]

The dangers of letting the extraordinary Major Questions exception swallow the general rule are already becoming clear. Just four months after *Georgia v. President of the United States,*

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[69] *Bailey*, 568 U.S. at 204 (J.'s Scalia, Ginsburg, and Kagan concurring).
[70] *See Id.* at 1314 ("Although the major questions doctrine has never been applied to an exercise of proprietary authority and has never been applied to the exercise of power by the President, I will assume that the doctrine does apply.") (Judge Anderson Concurring in part and dissenting in part).
[71] *Id.* at 1311–12 (Judge Anderson concurring in part and dissenting in part).
[72] *Id.* (Judge Anderson concurring in part and dissenting in part).
[73] *Cf Georgia*, 46 F.4th at 1301 (punting on this questions, the court simply noted that "President Obama requir[ed] federal contractors to provide paid sick leave to employees. *See* Exec. Order No. 13706, 80 Fed. Reg. 54,697 (Sept. 7, 2015). We do not weigh in on its validity here.").
[74] *West Virginia*, 142 S. Ct. at 2608 (quoting *Brown & Williamson* , 529 U. S. at 159).

an Arizona District Court addressed another Major Questions claim against an application of the Procurement Act, this time trying to overturn a minimum wage increase.[75] The district court rejected the Major Questions claim,[76] but the ruling is likely to be appealed, using up yet more taxpayer dollars and judicial resources to relitigate a long-settled issue.[77] This is exactly the erosion of boundaries that causes the Supreme Court repeatedly remind lower courts not to let the exceptions swallow the rule.

West Virginia's failure to address the relationship between Major Questions and *Chevron* further raises the possibility that courts could attempt to use Major Questions as the default administrative law doctrine if *Chevron* is overturned or become obsolete.[78] Such a result would be a massive expansion of the major questions doctrine with drastic implications for the ability of the federal government to function, but *West Virginia* clearly precludes this result. *West Virginia* designated Major Questions as a rare exception to the general rule in administrative law cases.[79] However, *West Virginia* did not state—as *King* and *Brown & Williamson* did—that the general rule in administrative law is *Chevron*.[80] Instead, *West Virginia* simply states that Major Questions does not apply in the "ordinary case" and that the doctrine is distinct from methods of "routine statutory interpretation."[81] The absence of *Chevron* in *West Virginia* means that the "exceptional cases" limitation is insulated from changes in other areas of administrative law.

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[75])
[76] *See* Arizona v. Walsh, No. CV-22-00213-PHX-JJT, 2023 U.S. Dist. LEXIS 2649, at *22–26 (D. Ariz. Jan. 6, 2023
[77] *See Georgia*, 46 F.4th at 1311–12 (Judge Anderson concurring in part and dissenting in part).
[78] *See* Griffith & Proctor, *supra* note 386, at 717; Sohoni, *The Major Questions Quartet*, *supra* note 17, at 281.
[79] See *supra*, Section III.A.1
[80] *See* King v. Burwell, 576 U.S. 473, 485 (2015) ("When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*."); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) ("Because this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by *Chevron*.").
[81] West Virginia v. EPA, 142 S. Ct. 2587, 2608–09 (2022).

Even if *Chevron* is going the way of the dinosaurs,[82] Major Questions cannot replace it as the default in administrative law cases. Courts must remember to prevent the exception from swallowing the rule, even if the general rule changes over time.

[82] Jackson & Loring, *supra* note 296, at 27 ("The elephant--or perhaps dinosaur--in the room is the *Chevron* doctrine.").

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May 25, 2023

The Honorable Juan R. Sánchez
United States District Court for the Eastern District of Pennsylvania
14613 U.S. Courthouse
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Dear Chief Judge Sánchez,

I am a litigation associate at Sidley Austin LLP writing to apply for a clerkship position for the 2024 term. I hope to return to Philadelphia after falling in love with the city in college.

As an aspiring public servant, clerking in a district court will develop my legal research and writing skills in a way that few, if any, other experiences can. Further, as a Latina, I have always hoped to clerk for a Latin judge.

I do not have the network or background that makes a clerkship an expected part of my trajectory. But I can offer something valuable to your chambers. My parents immigrated to the United States shortly before my birth, and my navigation of this profession comes with both challenges and perspective. During my first pro bono trial at Sidley, my heritage helped me better communicate with our client, whose cultural background mirrored my own. Given the unique amalgam of viewpoints and culture I was exposed to from a young age, I engage with legal viewpoints with a critical but fair-minded lens.

In my first few months at Sidley, I drafted various pretrial motions, argued a motion to compel discovery, and took a witness in that pro bono civil rights trial in a federal district court. I also drafted a letter-motion to dismiss and various discovery motions in a commercial litigation matter in the same federal district court. Though new to the profession, I take initiative and aid my team through all stages of litigation.

In law school I continued to shape my legal research and writing skills through participation in the Civil Rights Litigation Clinic and the Journal of Criminal Law and Criminology. I wrote a major portion of a brief submitted to the Circuit Court of Cook County in a case concerning the incommunicado detention of protestors. My journal Note on the need for a First Amendment framework when assessing the constitutionality of government surveillance of mass protests was also published in JCLC's Volume 111, Issue 4.

Please see below for additional professional references:

- **Michael A. Levy**, Partner at Sidley Austin LLP
  - Contact Information: (212) 839-7341, mlevy@sidley.com
- **Brianna O. Gallo,** Managing Associate at Sidley Austin LLP
  - Contact Information: (212) 839-8416, bgallo@sidley.com
- **Steve Smith**, former Deputy Chief Communications Officer, ACLU; current Senior Vice President, Communications and Marketing, Earthjustice
  - Contact Information: (347) 628-4077, media@earthjustice.org

Thank you for your consideration.

Respectfully,
Ana Pajar Blinder

ANA PAJAR BLINDER
80 Dekalb Avenue, Brooklyn, NY 11201 • ablinder102@gmail.com • 201-414-2659

EXPERIENCE

Sidley Austin LLP, New York, NY
Litigation Associate, October 2022 – present
- Briefed various pretrial motions, argued motion to compel discovery, and took a witness in pro bono civil rights case
- Conduct legal research, aid with briefing, and assist with deposition preparation in commercial litigation matters

U.S. Department of Justice, Civil Division, Federal Programs Branch, Washington, D.C.
Legal Intern, July 2021 – August 2021
- Performed legal research for defensive government civil litigation and prepared draft briefs on motions

Sidley Austin LLP, New York, NY
Summer Associate, May 2021 – July 2021
- Briefed cases for oral argument preparation in civil litigation matter, conducted legal research contributing to motion for summary judgment, and drafted privacy policy for corporate client

United States District Court for the District of New Jersey, Newark, NJ
Judicial Intern to the Honorable Esther Salas, June 2020 – August 2020
- Performed legal research and writing for civil and criminal cases; proofed and cite-checked draft opinions and orders
- Prepared draft opinions on a motion to dismiss involving § 1983 claims; a class action certification motion grounded in alleged constitutional violations; and a motion to dismiss on jurisdictional and preemption grounds

American Civil Liberties Union (ACLU), New York, NY
Communications Strategist, April 2018 – August 2019
- Implemented strategic communications plan on ACLU's litigation and advocacy surrounding women's rights, immigrants' rights, and criminal justice reform
- Managed engagement strategy for digital, fundraising, development, coalition partners, and advocacy departments

National Football League (NFL), New York, NY
Communications and Social Responsibility Coordinator, November 2016 – April 2018
- Developed traditional and crisis communication strategies for key units within the social responsibility group
- Prepared senior leadership, corporate and nonprofit partners, and third-party advocates for media engagements
- Planned and executed communications strategies, media operations, and community impact/philanthropic legacy programs for events including Super Bowl, Draft, Kickoff, and Pro Bowl
- Supported cross-organizational strategic planning and development of corporate social responsibility initiatives

Rotational Program Analyst, July 2015 – November 2016
- Developed traditional and crisis communication strategies for key units within the social responsibility group
- Identified trends, insights, and best practices to generate revenue for NFL clubs

EDUCATION

Northwestern Pritzker School of Law, Chicago, IL
Juris Doctor, May 2022 (GPA: 3.85)
- JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, Diversity and Inclusion Editor
  - Note: *Don't (Tower) Dump on Freedom of Association: Protest Surveillance Under the First and Fourth Amendments* (published in JCLC Volume 111, Issue 4)
- Teaching Assistant, Criminal Law, Professor Janice Nadler, Fall 2020
- Civil Rights Litigation Clinic, Student Attorney, Fall 2020 – Spring 2022
- Latinx Law Students Association, Vice President of Academic Affairs

University of Pennsylvania, Philadelphia, PA
Bachelor of Arts in Communication, May 2015

ADDITIONAL INFORMATION

Language Skills: Portuguese (Fluent) and Spanish (Proficient)
Interests: Crossword puzzles, bossa nova, traveling, geopolitical non-fiction, writing, 90s hip-hop

Northwestern University
633 Clark Street
Evanston, IL 60208
United States

Name: Blinder,Ana
Student ID: 3233540

School of Law Official Transcript

Print Date: 01/14/2023
Staff Member, Journal of Criminal Law and Criminology (2020-21)
Diversty & Inclusion Editor, Journal of Criminal Law and Criminology (2021-22)

Degrees Awarded

Degree: Juris Doctor
Confer Date: 06/17/2022
Degree Honors: Cum Laude
Plan: Juris Doctor Major

Academic Program History

Program: **Juris Doctor**
07/26/2019: **Active in Program**
06/17/2022: **Completed Program**

Beginning of Law Record

2019 Fall (09/02/2019 - 12/19/2019)

Course	Description	Attempted	Earned	Grade	Points
BUSCOM 510	Contracts	3.000	3.000	A-	11.010
Instructor:	Jide Nzelibe				
CRIM 520	Criminal Law	3.000	3.000	A-	11.010
Instructor:	Janice Nadler				
LAWSTUDY 540	Communication& Legal Reasoning	2.000	2.000	A-	7.340
Instructor:	Rebekah Holman				
LITARB 530	Civil Procedure	3.000	3.000	B+	9.990
Instructor:	James Pfander				
PPTYTORT 530	Property	3.000	3.000	B	9.000
Instructor:	Nadav Shoked				

		Attempted	Earned	GPA Units	Points
Term GPA	3.454 Term Totals	14.000	14.000	14.000	48.350
Cum GPA	3.454 Cum Totals	14.000	14.000	14.000	48.350

2020 Spring (01/13/2020 - 05/07/2020)

Course	Description	Attempted	Earned	Grade	Points
CONPUB 500	Constitutional Law	3.000	3.000	CR	0.000
Instructor:	Heidi Kitrosser				
CONPUB 610	First Amendment	3.000	3.000	CR	0.000
Instructor:	Jason DeSanto				
CONPUB 695	International Criminal Law	3.000	3.000	CR	0.000
Instructor:	Marco Bocchese				
LAWSTUDY 541	Communication& Legal Reasoning	2.000	2.000	CR	0.000
Instructor:	Rebekah Holman				
PPTYTORT 550	Torts	3.000	3.000	CR	0.000
Instructor:	James Speta				

		Attempted	Earned	GPA Units	Points
Term GPA	0.000 Term Totals	14.000	14.000	0.000	0.000

A global health emergency during this term required significant changes to university operations that affected student enrollment and grading. Unusual enrollment patterns and grades during this period reflect the tumult of the time, not necessarily the work of individual students.

		Attempted	Earned	GPA Units	Points
Cum GPA	3.454 Cum Totals	28.000	28.000	14.000	48.350

2020 Summer (05/11/2020 - 08/15/2020)

Course	Description	Attempted	Earned	Grade	Points
CONPUB 647D	Practicum: Judicial	4.000	4.000	A-	14.680
Instructor:	Monica Llorente				

		Attempted	Earned	GPA Units	Points
Term GPA	3.670 Term Totals	4.000	4.000	4.000	14.680
Cum GPA	3.502 Cum Totals	32.000	32.000	18.000	63.030

2020 Fall (08/24/2020 - 12/17/2020)

Course	Description	Attempted	Earned	Grade	Points
CONPUB 661	Election Law	3.000	3.000	A	12.000
Instructor:	Michael Kang				
CRIM 610	Constitutional Crim Procedure	3.000	3.000	A+	12.990
Instructor:	Ronald Allen				
LAWSTUDY 500	Independent Study	3.000	3.000	A+	12.990
Instructor:	Matthew Kugler				
LITARB 600P	Leg. Ethics: Public Int.&Gov	2.000	2.000	B+	6.660
Instructor:	Wendy Muchman Mary Foster				
LITARB 721	Clinic:Civil Rights Litigation	4.000	4.000	A	16.000
Instructor:	Locke Bowman David Shapiro Vanessa del Valle Alexa Van Brunt				

Term Honor: Dean's List

		Attempted	Earned	GPA Units	Points
Term GPA	4.043 Term Totals	15.000	15.000	15.000	60.640
Cum GPA	3.748 Cum Totals	47.000	47.000	33.000	123.670

Northwestern University
633 Clark Street
Evanston, IL 60208
United States

Name: Blinder,Ana
Student ID: 3233540

School of Law Official Transcript

2021 Spring (01/11/2021 - 05/06/2021)

Course	Description	Attempted	Earned	Grade	Points
LAWSTUDY 593	Perspectives on Lawyering	2.000	2.000	A	8.000
Instructor:	Wendy Muchman Mary Foster				
LAWSTUDY 620	Advanced Legal Research	2.000	2.000	A	8.000
Instructor:	Jamie Sommer Ronald Bowman				
LAWSTUDY 710	Privacy Law	3.000	3.000	A+	12.990
Instructor:	Matthew Kugler				
LITARB 635	Evidence	3.000	3.000	A-	11.010
Instructor:	Susan Provenzano				
LITARB 721	Clinic:Civil Rights Litigation	4.000	4.000	A	16.000
Instructor:	Locke Bowman David Shapiro Vanessa del Valle Alexa Van Brunt				

Term Honor: Dean's List

		Attempted	Earned	GPA Units	Points
Term GPA	4.000 Term Totals	14.000	14.000	14.000	56.000
Cum GPA	3.823 Cum Totals	61.000	61.000	47.000	179.670

2021 Fall (08/30/2021 - 12/16/2021)

Course	Description	Attempted	Earned	Grade	Points
CONPUB 764	Saving the News	1.000	1.000	A	4.000
Instructor:	Martha Minow				
LITARB 605	Trial Advocacy ITA	4.000	4.000	A-	14.680
Instructor:	Steven Lubet				
LITARB 721	Clinic:Civil Rights Litigation	4.000	4.000	A	16.000
Instructor:	David Shapiro Locke Bowman David Shapiro Vanessa del Valle Alexa Van Brunt				
PPTYTORT 650	Intellectual Property	3.000	3.000	A-	11.010
Instructor:	David Schwartz				

Term Honor: Dean's List

		Attempted	Earned	GPA Units	Points
Term GPA	3.808 Term Totals	12.000	12.000	12.000	45.690
Cum GPA	3.820 Cum Totals	73.000	73.000	59.000	225.360

2022 Spring (01/10/2022 - 05/05/2022)

Course	Description	Attempted	Earned	Grade	Points
LITARB 721	Clinic:Civil Rights Litigation	4.000	4.000	A	16.000
Instructor:	Locke Bowman David Shapiro Vanessa del Valle Alexa Van Brunt				
LITARB 896	Intensive Clinical Practice	8.000	8.000	A	32.000
Instructor:	Locke Bowman David Shapiro Vanessa del Valle Alexa Van Brunt				

Term Honor: Dean's List

		Attempted	Earned	GPA Units	Points
Term GPA	4.000 Term Totals	12.000	12.000	12.000	48.000
Cum GPA	3.850 Cum Totals	85.000	85.000	71.000	273.360

End of School of Law Official Transcript

Northwestern University Pritzker School of Law

375 East Chicago Avenue ·Chicago, IL 60611 ·PHONE: 312-503-8464

ACCREDITATION
Northwestern University is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. Other professional, college, school, and departmental accreditations are listed here: http://www.registrar.northwestern.edu/academic_records/index.html

ACADEMIC CALENDARS
Pritzker School of Law operates on a traditional semester calendar consisting of two terms (Fall and Spring) each lasting 16 weeks, one Summer term lasting approximately 15 weeks, and one Winter Intersession term lasting approximately 3 weeks. Terms may include shorter sessions.

JDMBA students follow the university quarter calendar during their second year of enrollment. The quarter system consists of three quarters lasting approximately 10 weeks and one summer session lasting 10-11 weeks. Terms may include shorter sessions.

CREDIT
Pritzker School of Law uses a semester credit hour system. 1 unit of Quarter Credit earned in university courses outside the Law School and applied toward the law degree is shown as 2.5 Semester Credits.

EXPLANATION OF GRADES AND GRADE POINTS
The following systems of grading academic performance are used at the Law School. For systems used from 1968 – 2000, please visit http://www.law.northwestern.edu/registrar/gradingpolicy/transcript-supplement *(For systems prior to entrance in 1968, please inquire.)*

Since 2000: Beginning in the fall of 2000, grades and their numerical equivalent on a 4.33 scale are given below:
A+/4.33, A/4.0, A-/3.67, B+/3.33, B/3.0, B-/2.67, C+/2.33, C/2.0, D/1.0, F/0, I (Incomplete)/0

Fall 2000 – Summer 2017: Mandatory grade curve for all courses over 40 in enrollment:
A+/3-7%, A/12-15%, A-/10-15%, B+/15-30%, B/20-35%, B-/10-15%, C+/0-7.5%, C/0-7.5%, D&F/0-7%

Grade Points and Grades Used by Kellogg School of Management (non-executive MBA Programs, applies primarily to JDMBAs in their second year of enrollment)
A (Excellent)/4.0, B (Good)/3.0, C (Satisfactory)/2.0, D (Poor but passing)/1.0, F (Fail)/0.0, X (Missed final exam)/0.0, Y (Work Incomplete)/0.0

Since Fall 2017: Mandatory Grading Policy:

- First-Year Courses
  - In first-year required courses, other than Communication and Legal Reasoning (CLR), the mean will be 3.35, with a permitted range of 3.3 - 3.4. Faculty are also required to adhere to a mandatory distribution of no more than 5% A+ grades (rounded up) and at least 10% B- and below grades (rounded down).
  - In Communication and Legal Reasoning (CLR) and Common Law Reasoning courses, the mean will be 3.45, with a permitted range of 3.4 - 3.5.
- Upper-level doctrinal courses, including 1L Electives
  - In all upper-level doctrinal courses with enrollments of 13 or larger, the mean will be a 3.55, with a permitted range of 3.5 - 3.6. A doctrinal course is a lecture course in which the grade is primarily based on an exam.
- No other courses are subject to a mandatory mean or curve.

Class rank is not recorded or reported.

GRADE POINT AVERAGE (GPA)
All courses attempted are recorded on the transcript and used in the GPA calculation, including repeated course attempts. GPA is computed by taking the total grade points divided by the attempted units. CR (Credit), NC (No Credit), IP (In Progress), T (Transfer), K (Continued), NR (No Grade Reported) and W (Withdrawn) grades are not included in GPA calculations. Grades noted with an asterisk represent University courses completed outside the Law School, that are not part of a joint program, and are not counted in the GPA calculation.

To graduate, a student must convert all I, IP, and K grades to a credit-bearing grade and achieve a cumulative grade point average of 2.250 or higher.

STATUS
Students should be regarded as in good academic standing unless otherwise noted.

TRANSFER CREDIT
The Law School documents articulated transfer credit by listing the institution of record and a T grade for each approved course. Grades for work transferred from another institution are not recorded. If such grades are needed, the student must request a transcript directly from the awarding institution.

Last revised: Dec 2017

NORTHWESTERN PRITZKER SCHOOL OF LAW

May 25, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Ana Pajar Blinder for a judicial clerkship. I first met Ana when she was a student in my Criminal Law class during the Fall 2019 semester. Ana demonstrated that she is a strong student, always well prepared for class, and ready to volunteer for discussion. Her contributions were consistently insightful, and she had a positive impact on class discussion. We spoke frequently throughout the semester, usually during office hours, where she would pose insightful questions. She submitted a well-written and strongly reasoned exam and did well in the course.

I was so impressed with Ana's performance in the course that I invited her to serve as a teaching assistant for Criminal Law in Fall 2020. We met weekly to discuss the lectures, assignments, and quizzes. Ana's input was crucial in my development of weekly quiz assessments – she proofread the questions carefully and highlighted for me places where ambiguities could give rise to student confusion. Ana met regularly with students in the class to provide academic support as well as crucial collegial support during a semester when classes were taught entirely remotely. As a teaching assistant for Criminal Law, Ana was a reliable, congenial resource for the students enrolled in the course, and a valuable source for me to get a sense of the students' understanding.

Prior to attending law school, Ana was a communications professional in the National Football League. She worked in crisis management, and she has a good knack for strategic thinking and a familiarity and comfort with a fast-paced work environment. In addition, Ana already has experience working as a judicial intern where she was in the mix in chambers assisting with research, writing, and proofing decisions and orders.

I believe that Ana Pajar Blinder's sharp intellect, diligence, and strong writing skills make her an excellent candidate for judicial clerk in your chambers. I recommend her highly and without reservation. If you have any questions, please feel free to contact me at 312-503-3228.

Respectfully,

Janice Nadler, JD/PhD
Nathaniel L. Nathanson Professor of Law
Northwestern Pritzker School of Law

Janice Nadler - jnadler@law.northwestern.edu - (312) 503-0659

NORTHWESTERN PRITZKER SCHOOL OF LAW

May 25, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to strongly recommend Ana Blinder for a judicial clerkship. I have supervised and worked closely with Ana over the past year as part of the MacArthur Justice Center's Civil Rights Litigation Clinic at Northwestern Pritzker School of Law, of which I am the director. Ana is a hardworking and dedicated advocate, who intends to pursue a legal practice with a social justice focus. She would be an asset to your chambers.

For the past year, Ana has made important contributions to MacArthur's casework, including on groundbreaking litigation. Ana deftly drafted responses to motions to dismiss in a state civil rights case challenging the City of Chicago's failure to provide access to attorneys for people in police custody—a challenge to "incommunicado detention." She spearheaded legal research on issues of justiciability and the contours of the Illinois Civil Rights Act, which provides relief to litigants who can show disparate impacts in the administration of government programs. She assisted in preparing for depositions in a wrongful conviction damages action against Chicago police detectives. And in furtherance of her interest in government surveillance, Ana conducted legal research to develop litigation strategies challenging "ShotSpotter," a ubiquitous gunshot detection technology used by the Chicago police. Outside of clinic, in her law school summers, Ana developed proficiency in litigation through a judicial externship and as a legal intern at the Department of Justice's Civil Division. In short, as a rising third year student, Ana has already garnered extensive experience as a legal advocate.

Ana is dedicated to a career in the public interest, and she hopes to return to the ACLU (where she worked prior to law school) as an attorney in its privacy program. A clerkship would provide Ana with a solid foundation to pursue a career promoting civil and human rights.

Finally, Ana is a warm, funny, and forthright person. I very much enjoyed working with her on a personal level; I have no doubt Ana's co-clerks and other staff in the office would feel the same. I welcome the opportunity to speak with you more about Ana Blinder. Please feel free to contact me at 312-503-1336 or a-vanbrunt@law.northwestern.edu. Thank you for your consideration.

Respectfully,

Alexa Van Brunt

Clinical Professor of Law
Director, MacArthur Justice Center Civil Rights Litigation Clinic
Northwestern Pritzker School of Law

Director, Illinois Office
Roderick and Solange Macarthur Justice Center

NORTHWESTERN PRITZKER SCHOOL OF LAW

May 25, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing this letter of recommendation on behalf of Ana Blinder. Over the last year, Ana has greatly impressed me as an intelligent and hardworking person with great attention to detail. I have no doubt that she will be an excellent clerk, and I very strongly recommend her.

I first met Ana when she did an independent study with me during the Fall of 2020. Normally I only do independent studies with students whom I have previously had in a class, but I bent that rule for Ana because she had a particularly interesting topic: the constitutional implications of surveillance at political protests. Using relatively basic investigative tools – cell tower monitoring in particular – it is possible to readily track who attends political protests. Though this monitoring during a normal criminal investigation would not raise problems under the Fourth Amendment, Ana thought that there could be problems under the First Amendment.

Addressing this concern required Ana to synthesize several complicated areas of First and Fourth Amendment doctrine. She needed to tease out the rules surrounding national security surveillance and understand the various procedural reasons that courts have avoided reaching the merits of challenges to prior programs. She needed to think carefully about older cases applying the First Amendment to state government programs monitoring the civil rights movement. And she needed to relate all of this to the technological tools of interest to her, particularly cellphone tower dumps – information requests that reveal which cellphones were in a certain area at a certain time.

In addition to being inherently interesting, this paper also gave me the opportunity to observe Ana's writing process. My independent study students submit multiple drafts and get extensive feedback. Ana responded extremely well to constructive suggestions. When I told her to consider the implications of some new case or procedural feature, it was thoughtfully incorporated in the next draft. When I expressed skepticism on points, they were either further supported or revised. The tightness and quality of her writing also improved from draft to draft. All of this shows me that, in addition to being a good writer and researcher, Ana is also open to improving on her already excellent skills. This strikes me as extremely valuable in someone at the early stages of her legal career.

Ana did extremely well with this project, earning an A+. Throughout the semester I was impressed with her intelligence, her work ethic, her insight, and her personality. Ana was extremely easy to work with and maintained good humor, even when suffering from 2L overload. She readily understood complex doctrines and "got" how procedural requirements were affecting substantive results. I was unsurprised that her journal decided to publish this project as a Note and am citing it in one of my own forthcoming pieces.

Following the independent study, Ana was a student in my Privacy Law class in Spring 2021. This was a doctrinal lecture-based class with many students. Nevertheless, Ana displayed a high level of engagement throughout the course and a sharp intellect. Though I cold called her on some of the material that overlapped with her prior paper – the Keith case, to be precise – Ana also was an active volunteer. I was very glad to have her in class, especially as this was a Zoom semester.

Ana earned the highest raw score on Privacy Law's final exam (taken by 52 students). This exam was blind graded; meaning that I had no idea whose exam I was grading when I went through the questions. I had actually decided to use the exam as a model answer – in addition to being good, it was also well-written – before I had unblinded the scores. Ana's background in the independent study was certainly relevant to some of what we covered in the course, but likely only two weeks out of thirteen. It is not like national security surveillance helps much with understanding HIPAA or data breach. Having formed a strongly positive opinion about Ana from advising her writing, I was extremely impressed to witness her translate that to exams as well.

Ana also has extensive experience outside the context of my classes. Her 2L performance has been extremely strong in both doctrinal and experiential classes. An A+ in Ron Allen's criminal procedure class is no small thing. She has spent a year in a clinic, TAed a 1L course, interned at the DOJ, and is on the editorial board of her journal. Prior to law school, she worked with the ACLU and did communications for the NFL. All in all, she is an extremely busy and impressive person.

Based on my experience supervising Ana's writing and of teaching her in a doctrinal course, I strongly recommend her. I have every reason to think that she will be an able member of any team she chooses to join. Please do not hesitate to contact me if there is any other information I can provide.

Respectfully,

Matthew Kugler

Matthew Kugler - matthew.kugler@law.northwestern.edu - (312) 503-3568

Professor of Law
Northwestern Pritzker School of Law

Matthew Kugler - matthew.kugler@law.northwestern.edu - (312) 503-3568

Ana Pajar Blinder

The below writing sample is an opinion written during my judicial externship with Judge Salas in the United States District Court for the District of New Jersey.

This version of the opinion was written substantially by me. Judge Salas gave me permission to use this as a writing sample.

In addition, names and other identifying information have been changed.

Ana Pajar Blinder

Not for Publication

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ALBUS PERCIVAL WULFRIC BRIAN DUMBLEDORE, **Plaintiff,** **v.** **OFFICE OF THE COUNTY PROSECUTOR, COUNTY OF MAYHEM, *et al.*,** **Defendants.**	**Civil Action No. 12-34567 (AB) (CDE)** **OPINION**

MORO, DISTRICT JUDGE

Before the Court is defendants State of Chaos, Office of the County Prosecutor, County of Mayhem ("MCPO"), Office of the Attorney General, Eli Manning, Nathan Zuckerman, and Omar Little's (collectively, "Defendants") motion to dismiss plaintiff Albus Percival Wulfric Brian Dumbledore's ("Plaintiff") complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The Court has considered the parties' submissions and decides this matter without oral argument pursuant to Federal Rule of Civil Procedure 78. For the reasons set forth below, Defendants' motion to dismiss is GRANTED.

I. Background

This action stems from Plaintiff's nearly four-year pre-trial incarceration and subsequent acquittal of charges for the murder of Margaret Thatcher ("Thatcher") and her daughter Ursula. Plaintiff previously had a romantic relationship with Thatcher. (D.E. No. 5, Amended Complaint ("Am. Compl.") ¶ 13). Upon the termination of their relationship, Plaintiff remained close with

both Thatcher and her daughter and was accustomed to frequent communications with Thatcher. (*Id.* ¶¶ 15–16). On January 30, 2013, Plaintiff grew concerned because Thatcher had not returned his calls for an extended time. (*Id.* ¶ 16). As a result, Plaintiff went to Thatcher's home, and when no one answered the door, he broke in through a window. (*Id.*). A neighbor witnessed the break-in and called the police. (*Id.*). Plaintiff found Thatcher stabbed to death and her daughter suffocated to death. (*Id.* ¶¶ 17–18). Shortly thereafter, the police arrived, and Plaintiff was taken into custody and charged with homicide, among other charges. (*Id.* ¶¶ 18–20). Plaintiff remained in prison until his case was tried. (*Id.* ¶ 22). Over four years later, on September 16, 2017, a jury acquitted Plaintiff of all charges against him. (*Id.* ¶ 30).

Based on these facts, Plaintiff commenced this action on August 5, 2019, and filed an amended complaint on August 14, 2019. Plaintiff brings a claim for violation of 42 U.S.C. § 1983 ("Section 1983") and various state law torts, including malicious prosecution, wrongful imprisonment, false arrest, and intentional infliction of emotional distress. (*Id.* ¶¶ 32–43).

II. Legal Standard

A. 12(b)(1) Standard

Federal courts are of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Courts must dismiss actions if they lack subject matter jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). Such jurisdictional objections are governed by Federal Rule of Civil Procedure 12(b)(1). *Id.*

Because "[t]he Eleventh Amendment is a jurisdictional bar which deprives federal courts of subject matter jurisdiction," Defendants' motion is, in part, considered a motion to dismiss for lack of jurisdiction under Rule 12(b)(1). *See Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690,

694 (3d Cir. 1996) (citing *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 98–100 (1984)). A suit should be dismissed under Rule 12(b)(1), rather than Rule 12(b)(6) "where a waiver of sovereign immunity does not apply." *CAN v. U.S.*, 535 F.3d 132, 144 (3d Cir. 2008) (internal marks and citation omitted). Otherwise put, absent a specific waiver of sovereign immunity, the courts lack subject matter jurisdiction over claims against the United States and its agencies. *See, e.g.*, *Hercules, Inc. v. United States*, 516 U.S. 417, 422 (1996); *In re Univ. Med. Ctr.*, 973 F.2d 1065, 1085 (3d Cir. 1992); *see also Anselma Crossing, L.P. v. U.S. Postal Serv.*, 637 F.3d 238, 240 (3d Cir. 2011).

"A Rule 12(b)(1) motion may be treated as either a facial or factual challenge to the court's subject matter jurisdiction." *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000). In a facial challenge to subject matter jurisdiction, "the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Id.* In a factual attack to subject matter jurisdiction, however, "the court may consider evidence outside the pleadings." *Id.* (citing *Gotha v. United States*, 115 F.3d 176, 178-79 (3d Cir. 1997). "When a party moves to dismiss prior to answering the complaint . . . the motion is generally considered a facial attack." *Id.*; *see also Garcia v. Knapp*, No. 19017946, 2020 WL 2786930, at *4 (D.N.J. May 29, 2020) ("Defendants, by asserting Eleventh Amendment immunity, raise a facial 12(b)(1) challenge."). Typically, once a Rule 12(b)(1) challenge is raised, the burden shifts to the plaintiff to demonstrate the existence of subject matter jurisdiction. *See McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 286 (3d Cir. 2006). "However, because 'Eleventh Amendment immunity can be expressly waived by a party, or forfeited through non-assertion, it does not implicate federal subject matter jurisdiction in the ordinary sense,' and therefore, a party

asserting Eleventh Amendment immunity bears the burden of proving its applicability." *Garcia*, 2020 WL 2786930, at *3 (quoting *Christy v. PA Tpk. Comm.*, 54 F.3d 1140, 1144 (3d Cir. 1994)).

B. 12(b)(6) Standard

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). More than labels and conclusions are required, "and a formulaic recitation of a cause of action's elements will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). The Court is not required to accept as true "legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Thus, "'stating ... a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element[s]." *Wilkerson v. New Media Tech. Charter Sch. Inc.,* 522 F.3d 315, 322 (3d. Cir.2008) (quoting *Twombly,* 550 U.S. at 556).

III. Analysis

A. Section 1983 Claims

Section 1983 provides a remedy for "every person" for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The purpose of Section 1983 is, in part, "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158**,** 161 (1992) (quoting *Carey v. Piphus,* 435 U.S. 247, 254–257 (1978)). The Supreme Court has held that in order to seek redress through Section 1983, "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (emphasis in original). While on its face Section 1983

affords no immunities, the Supreme Court has "accorded certain government officials either absolute or qualified immunity." *Wyatt*, 504 U.S. at 164.

The Defendants argue that Plaintiff's Section 1983 claims fail (i) based on sovereign, prosecutorial, and qualified immunity; (ii) because no Defendant constitutes a "person" under Section 1983; and (iii) because no specific factual allegations are pleaded against the individual prosecutor Defendants. (*See generally* D.E. No. 16–1 ("Def. Mov. Br.")). Many of these arguments are unrebutted by Plaintiff, who argues only that the prosecutors in this case do not benefit from absolute immunity and cannot claim the protections of qualified immunity. (*See* D.E. No. 27 ("Opp. Br.")). The Court agrees with Defendants that there are multiple grounds for dismissal of the Section 1983 claims, though it need not, and will not, address all of Defendants' arguments.

i. Sovereign Immunity

The Eleventh Amendment protects non-consenting states from suits brought in federal court by private citizens seeking monetary damages. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); U.S. Const. amend. XI. Eleventh Amendment immunity can extend to state agencies and instrumentalities acting as "arm[s] of the state." *Regents of the University of California v. Doe*, 519 U.S. 425, 425 (1997). A state entity is characterized as an arm of the state when a judgment against it "would have essentially the same practical consequences as a judgment against the State itself." *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 546 (3d Cir. 2007). Immunity also extends to state officials when they "are sued for damages in their official capacity." *Kentucky v. Graham*, 473 U.S. 159, 161 (1985).

Applying these standards to the various Defendants in this lawsuit, the Court concludes that Plaintiff's Section 1983 claims must be dismissed at least as to some Defendants. To start,

the State of Chaos and the Office of the Chaos Attorney General are clearly covered by the Eleventh Amendment and are immune from suit. *See Lombardo v. Pa. Dep't of Pub. Welfare*, 540 F.3d 190, 194–95 (3d Cir. 2008); *Mikhaeil v. Santos*, 646 Fed. Appx. 158, 162 (3d Cir. 2016) (affirming dismissal of section 1983 claims against the state of New Jersey and the state Attorney General because "[i]nsofar as they were sued for damages in their official capacities, they are entitled to Eleventh Amendment immunity."). Indeed, Plaintiff does not argue otherwise. *See Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (holding that respondents must show the State has waived its immunity); *Welch v. Texas Dept. of Highways and Public Transp*., 483 U.S. 468, 474 (1987) (holding Congress has the power to abrogate Eleventh Amendment immunity of a State without its consent if it expresses its intent to do so in "unmistakable language in the statute itself." (internal marks and citation omitted)).

With respect to the remaining defendants—MCPO and the individual prosecutors—the analysis turns on whether the state is a real party in interest, making these defendants an arm of the state.[1] *Estate of Lagano v. Bergen Cty. Prosecutor's Office*, 769 F.3d 850, 858 (3d Cir. 2014). The Third Circuit considers three factors to make this determination: "(1) whether the money to pay for the judgment would come from the state; (2) the status of the agency under state law; and (3) what degree of autonomy the agency has." *Id*. (citing *Fitchik v*. *N.J*. *Transit Rail Operations*, 873 F.2d 655, 659 (3d Cir. 1989)). The parties do not frame their arguments in terms of the *Fitchik* factors, instead focusing on whether the claims against the MCPO and its employees encompass classic law enforcement and investigative functions during a prosecution. (Mov. Br. at 7–8 (citing *Beightler* v. *Office of Essex Cty. Prosecutor*, 342 F. App'x 829 (3d Cir. Aug. 29,

[1] There is no indication as to whether the individual prosecutors are sued in their personal or official capacities. For Eleventh Amendment purposes, the Court presumes the individual prosecutors are sued in their official capacities. In official-capacity actions, only sovereign immunities—such as Eleventh Amendment immunity—are available, while numerous personal immunity defenses are available in personal-capacity actions. *Graham*, 473 U.S. at 167.

2009); Opp. Br. at 11–19; D.E. No. 28 ("Reply Br.") at 3–4). But the Third Circuit has rejected such an approach. *Estate of Lagano*, 769 F.3d at 857–858 ("[W]e are not bound or persuaded by *Beightler's* statement that the *Fitchik* inquiry is satisfied whenever a county prosecutor engages in classic prosecutorial functions. We therefore conclude that *Fitchik* provides the proper framework for analyzing Eleventh Amendment sovereign immunity as it applies to county prosecutors."). Thus, because claims against the remaining defendants are dismissed on other grounds, the Court does not endeavor to conduct this analysis for the parties.

Count I is therefore dismissed on the basis of Eleventh Amendment immunity, against the State of Chaos and the Office of the Chaos Attorney General.

ii. Persons Under Section 1983

Defendants also argue that even if Plaintiff's Section 1983 claims are not barred by Eleventh Amendment immunity, they must be dismissed because no Defendant is a "person" under the meaning of the Section 1983. The Court agrees.

States and state agencies are not considered "persons" within the meaning of Section 1983, providing another reason for dismissal of the State of Chaos and the Office of the Attorney General. *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 697 (3d Cir. 1996). However, local governmental bodies and their officials may be considered "persons" under Section 1983. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978). When county prosecutors perform "classic law enforcement and investigative functions" they are arms of the State, but when they engage in administrative tasks "unrelated to the duties involved in criminal prosecution" they act on behalf of the county. *Coleman v. Kaye*, 87 F.3d 1491, 1505-56 (3d Cir. 1996) (abrogated on different grounds). Courts routinely dismiss county prosecutors from suits involving Section 1983 claims. *See Mikhaeil v. Santos*, 646 F. App'x. 158, 161 (3d Cir. 2016) (affirming lower court

holding that prosecuting attorney was immune for role in prosecuting criminal case); *Coley v. County of Essex*, No. 10-3530, 2011 WL 2065065, at *4 (3d Cir. May 36, 2011) (holding presentation of case to a grand jury constituted a law enforcement function, rendering prosecutor's office an arm of the state).

Here, Plaintiff claims the MCPO and individual prosecutors failed to "properly investigate" his conduct because they "ignored significant exculpatory evidence." (Am. Compl. ¶¶ 23 & 41). Specifically, Plaintiff alleges Defendants ignored their own expert's footprint evidence, ignored fingerprint evidence found in the victim's home, and failed to test a DNA sample found on the victim. (*Id*. ¶¶ 26–28). The complained conduct amounts to classic law enforcement and investigative functions. *Coleman*, 87 F.3d at 1505. The MCPO and its individual prosecutors are therefore considered arms of the state. Section 1983 claims will additionally be dismissed against the county prosecutor's office and its officials, as they are not considered "persons" under its meaning.

As such, Count I is dismissed against all Defendants on the basis of this analysis.

B. State Law Tort Claims

Finally, Defendants argue several grounds for dismissal of the state law tort claims presented in Count II. But the Court does not reach these arguments because, to the extent any such state law claims exist, the Court declines to exercise supplemental jurisdiction. *See* 28 U.S.C. § 1367; *Washington v. Specialty Risk Servs.*, No. 12-1393, 2012 WL 3528051, at *2 (D.N.J. Aug. 15, 2012) (noting that "[w]here the claim over which the district court has original jurisdiction is dismissed before trial, the district court *must* decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative

justification for doing so") (alterations in original) (quoting *Hedges v. Musco*, 204 F.3d 109, 123 (3d Cir. 2000)). Accordingly, these claims are dismissed *without prejudice*.

IV. Conclusion

For the forgoing reasons, the Court GRANTS Defendants' motion. Plaintiff's Section 1983 claims are dismissed *with prejudice*. The remaining claims are based on state law and Plaintiff's complaint asserts supplemental jurisdiction over those claims. Because federal claims are dismissed with prejudice, this Court declines to exercise supplemental jurisdiction over remaining state law claims, and those claims are dismissed *without prejudice*. An appropriate Order accompanies this Opinion.

Below is an excerpt of my Note, selected for publication by the Journal of Criminal Law and Criminology for Fall 2021. This Note received thorough comments by my independent study advisor, Professor Matthew Kugler, prior to its submission for publication. It has since been through two rounds of substantive edits by the Journal Board.

The Note focuses on the constitutional implications of tower dumps, the acquisition of location data of cell phones connected to specific cell towers, when used to surveil mass protests. The Note argues the insufficiency of Fourth Amendment protections for protesters being surveilled by government actors by tactics—such as tower dumps—can be solved by conducting independent First Amendment analyses. A multi-factor balancing test can assist the courts as they consider the scope and pervasiveness of technology such as tower dumps against the potential chilling effects on First Amendment-protected activity, providing a framework to assess the constitutionality of surveillance technology used during mass protests. Part I, excluded from this writing sample to conserve length, outlines the tangible First Amendment harms posed by government use of tower dumps to surveil protestors and how that injury is conceptualized doctrinally. Part I argues that despite a body of law established to clarify freedom of association protections, jurisprudence has not directly or sufficiently addressed the problem in the context of protest in the modern digital age, in large part due to the courts' reliance on and deference to Fourth Amendment doctrine.

Part II argues the Fourth Amendment is an insufficient framework for courts to utilize when addressing the First Amendment implications of technological surveillance of protests. Finally, Part III illustrates how the doctrinal standard used for freedom of association should be applied when the First Amendment is implicated in novel privacy cases.[1]

[1] This Comment also advances its argument with the contextual awareness that while tower dumps are one of the more dangerous ways of infringing on protestors' rights, other technologies used in combination can drive First

II. THE FAILURE OF THE FOURTH AMENDMENT

Part II will argue that despite the judicial tendency to rely on the Fourth Amendment when assessing the legality of government surveillance tactics, it is an unreliable doctrinal framework. More specifically, Part II will posit that First Amendment concerns are not sufficiently addressed by the modern privacy cases because the Fourth Amendment cannot solely determine whether tower dump requests for data gathered during First Amendment-protected activity should proceed without a warrant.

A. The Fourth Amendment's Doctrinal Inadequacy

At the highest level, the Fourth Amendment protects against unreasonable searches and seizures.[2] Trespasses are searches,[3] as are violations of reasonable expectations of privacy.[4] The warrant requirement of the Fourth Amendment[5] can only be bypassed through certain exceptions.[6] The Supreme Court has held that acquiring certain types of cell phone location data constitutes a search,[7] but has not yet ruled on a warrant requirement for tower dumps

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Amendment harms. *See* Andy Greenberg & Lily Hay Newman, *How to Protest Safely in the Age of Surveillance*, WIRED (May 31, 2020, 3:27 PM), https://www.wired.com/story/how-to-protest-safely-surveillance-digital-privacy/; William Roberts, *US law enforcement surveilled protests with drones, spy planes,* AL JAZEERA (June 11, 2020), https://www.aljazeera.com/news/2020/06/11/us-law-enforcement-surveilled-protests-with-drones-spy-planes/?gb=true; Lulu Garcia-Navarro, *How Authorities Can Use The Internet to Identify Protestors*, NPR (June 28, 2020, 7:59 AM), https://www.npr.org/2020/06/28/884351939/how-authorities-can-use-the-internet-to-identify-protesters. Tower dumps are a timely and relevant example, but there are more possibilities for freedom of association incursions. Facial recognition software, drone surveillance, iris-scanners, ShotSpotter technology, audio surveillance sysrems, and surveillance cameras are among the many new technologies and tools used by the government to surveil its citizens. Elizabeth E. Joh, PRIVACY PROTESTS: SURVEILLANCE EVASION AND FOURTH AMENDMENT SUSPICION, 55 Ariz. L. Rev. 997 (2013).

[2] U.S. CONST. amend. IV.

[3] *Jones*, 565 U.S. at 406.

[4] Katz v. U.S., 389 U.S. 347, 360 (1967).

[5] U.S. CONST. amend. IV.

[6] Kentucky v. King, 563 U.S. 452, 460 (2011). Exceptions include but are not limited to certain searches incident to arrest, exigent circumstances, administrative searches, stop and frisk, certain automobile searches, and custodial searches. Craig M. Bradley, TWO MODELS OF THE FOURTH Amendment, 83 Mich. L. Rev. 1468, 1473–1474 (1985).

[7] *See Jones,* 565 U.S. at 404 (holding GPS tracking was a search under the Fourth Amendment); *Riley*, 573 U.S. at 393 (holding a warrant is required to search digital data on a phone seized during an arrest, which involves greater privacy interests than a traditional inspection of an arrestee's pockets); *Carpenter,* 138 S. Ct. at 2221 (holding the Government needs a warrant before acquiring CSLI from a cell carrier).

specifically.[8] The surveillance of protestors necessarily implicates both the First and Fourth Amendments, particularly against marginalized groups.[9] Yet recent jurisprudence is almost entirely focused on novel privacy concerns—more specifically, how privacy is invaded by modern technology—and how certain electronic devices or data should be protected, or not, under only the Fourth Amendment.[10]

However, at best, the Fourth Amendment would provide uncertain protection in this realm. To start, no Supreme Court case has specifically addressed tower dumps.[11] The most recent Fourth Amendment cases assuredly began to grapple with what technological innovations could make their way into existing privacy doctrine.[12] In the oft-cited concurring opinion in *Jones*, Justice Sotomayor presaged the dangers of expansiveness of government surveillance, and the futility of a trespassory test in dealing with forms of surveillance that do not require physical invasion.[13] In acknowledging "[a]wareness that the Government may be watching chills associational and expressive freedoms," Justice Sotomayor went on to question "whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs . . ."[14]

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[8] *Carpenter*, 138 S. Ct. at 2220 (declined to rule on tower dumps).
[9] Rachel Levinson-Waldman, HIDING IN PLAIN SIGHT: A FOURTH AMENDMENT FRAMEWORK FOR ANALYZING GOVERNMENT SURVEILLANCE IN PUBLIC, 66 Emory L.R. 527, 553 (2017).
[10] *See* Stephen E. Henderson, REAL-TIME AND HISTORICAL LOCATION SURVEILLANCE AFTER UNITED STATES V. JONES: AN ADMINISTRABLE, MILDLY MOSAIC APPROACH, 103 J. Crim. L. & Criminology 803, 809 (2013); Evan Caminker, LOCATION TRACKING AND DIGITAL DATA: CAN CARPENTER BUILD A STABLE PRIVACY DOCTRINE?, 2018 Sup. Ct. Rev. 411, 411 (2018).
[11] The Court in C*arpenter* specifically declined to rule on "[r]eal-time CSLI or 'tower dumps.'" *Carpenter*, 138 S. Ct. at 2220.
[12] *See Jones,* 565 U.S. at 404 (holding GPS tracking was a search under the Fourth Amendment); *Riley*, 573 U.S. at 393 (holding a warrant is required to search digital data on a phone seized during an arrest, which involves greater privacy interests than a traditional inspection of an arrestee's pockets); *Carpenter,* 138 S. Ct. at 2221 (holding the Government needs a warrant before acquiring CSLI from a cell carrier).
[13] *Jones,* 565 U.S. at 415–16 (Sotomayor, J., concurring).
[14] *Id.* at 416 (Sotomayor, J., concurring).

However, *Jones* dealt with long-term CSLI monitoring.[15] Tower dumps are not long-term monitoring. They are captures of individual intervals, of a moment in time, or with triangulation, many moments in time.

Nor are tower dumps examples of long-term monitoring of individual persons, as addressed in *Carpenter*.[16] The majority took time to distinguish that cell location information is not "shared" in a typical sense because of its ubiquity in everyday life, and deals with an exhaustive amount of location data incomparable to the limited data dealt with in *Smith*.[17] It is a detailed record of physical locations over a prolonged time, rather than discrete uses. The privacy concerns, the Court reasoned, were greater in Carpenter's case than in *Jones*, as individuals compulsively carry cell phones with them, whereas they regularly leave their vehicles.[18] The Court moves incrementally in extending protections to technologies whose "tracking partakes of many of the qualities" of technologies addressed in previous cases.[19] However, they specifically have reserved the question of tower dumps.[20] And given tower dumps generally track "a person's movement at a particular time,"[21] it will be more difficult to argue a Fourth Amendment violation under *Carpenter*. Unless used in combination with other surveillance tools, or spanned across a large timeframe and radius, tower dumps are hardly a "detailed chronicle of a person's physical presence compiled every day, every moment, over several years," that troubled the Court.[22] The venture to persuade the Court will be daunting, given the very narrow conditions under which it decided *Carpenter* and its reluctance to make broader determinations on

[15] *Id.*
[16] *Carpenter*, 138 S. Ct. at 2217.
[17] *Id.* at 2210.
[18] *Id.* at 2218.
[19] *Id.* at 2216.
[20] *Id.* at 2221.
[21] *Id.* at 2220.
[22] *Id.*

"conventional surveillance techniques and tools."[23] The Court could not convincingly answer why tower dumps are not "the paradigmatic example of 'too permeating police surveillance' and a dangerous tool of 'arbitrary' authority,"[24] demonstrating the existing hurdles to extending *Carpenter*.

B. Judicial Maneauvering to Favor the Fourth Amendment Ignores the Problem

The courts have repeatedly sidestepped a First Amendment inquiry when they are able to maneuver judgments on other technical grounds or Fourth Amendment doctrine.[25] While a school of thought exists positing the Court should have an extremely limited role in deciding cases and controversies, the judiciary's decision to ignore First Amendment implications is not an example of laudable minimalism.[26] Consistently forcing free speech-adjacent issues into a Fourth Amendment prism is a refusal to address the developing constitutional threats posed by advancing technology used by law enforcement, rather than a principled adherence to a judicial preference for case-by-case judgment.[27] Addressing the First Amendment implications of government technology such as tower dumps is not inconsistent with minimalism; in fact, First Amendment doctrine often favors particularized adjudication.[28] As will be shown in Part III, the

[23] *Carpenter*, 138 S. Ct. at 2267 (Gorsuch, J., dissenting).
[24] *Id*.
[25] *See* Farra Bara, FROM MEMPHIS, WITH LOVE: A MODEL TO PROTECT PROTESTORS IN THE AGE OF SURVEILLANCE, 69 Duke L.J. 197, 208 (2019) ("Courts typically analyze surveillance under the Fourth Amendment"); Hannah Fuson, FOURTH AMENDMENT SEARCHES IN FIRST AMENDMENT SPACES: BALANCING FREE ASSOCIATION WITH LAW AND ORDER IN THE AGE OF THE SURVEILLANCE STATE, 50 U. Mem. L. Rev. 231, 266 (2019) ("First Amendment surveillance cases are not prevalent among the Supreme Court's jurisprudence"); Caitlin Thistle, A FIRST AMENDMENT BREACH: THE NATIONAL SECURITY AGENCY'S ELECTRONIC SURVEILLANCE PROGRAM, 38 Seton Hall L. Rev. 1197, 1198 (2008) ("Legal commentators have not paid much attention to the additional and independent First Amendment concerns with the NSA program.").

[26] Minimalist judges focus on the specifics before the court and try to avoid venturing "far beyond the problem at hand." Cass R. Sunstein, BEYOND JUDICIAL MINIMALISM, 43 Tulsa L. Rev. 825, 826 (2008).
[27] Cass R. Sunstein, PROBLEMS WITH MINIMALISM, 58 Stan L. Rev. 1899, 1902 (2006).
[28] In *Press-Enterprise*, the Court held a First Amendment right of public access hinges on passage of the "experience and logic" test. Press-Enterprise Co. v. Superior Court of Calif. for Riverside Cty., 478 U.S. 1, 9 (1986). *See also* W. Robert Gray, PUBLIC AND PRIVATE SPEECH: TOWARD A PRACTICE OF PLURALISTIC CONVERGENCE IN FREE-SPEECH VALUES, 1 Tex. Wesleyan L. Rev. 1, 72 n.398 (1994) ("Defamation law in this sense is ideologically neutral, and therefore is remitted to a [case-by-case] balancing test.").

courts can and should conduct case-by-case analyses utilizing balanced factors under the First Amendment. The problem with the jurisprudential history of cases dealing with government technology is not the Court's need to have a limited countermajoratarian role and rule as narrowly as possible, but rather, that the First Amendment is a better vehicle for these issues.

Irrespective of a specific potential expansion of *Carpenter*, given the sheer breadth of technological tools used by law enforcement—which will only continue to rapidly develop—the surveillance of protest activities should automatically trigger First Amendment protections. Some privacy proponents have argued for the expansion of Supreme Court trends precluding warrantless government acquisition of individuals' locations.[29] Such scholarship argues that First Amendment concerns posed by government tracking behoove the court to extend Fourth Amendment privacy protections to freedom of association matters.[30] However, the Fourth Amendment alone is unsuitable for determining the permissibility of warrantless tower dumps in the protest setting. Fourth Amendment doctrine is often narrowly applied, overly permissive, and has yet to convincingly acknowledge the unique importance of freedom of association.[31] And despite the constant overlap between the First and Fourth Amendments, the courts' predilection for Fourth Amendment analyses have only demonstrated the shortfalls of its application. Filling a gap in Fourth Amendment law does not do away with the First Amendment concerns raised by government surveillance of protests; in fact, the "development of a 'First Amendment criminal procedure' might begin to close the gaps in Fourth Amendment coverage by providing for the

[29] Brief for Center for Competitive Politics et al. as Amici Curiae Supporting Petitioner at 4, Carpenter v. U.S., 138 S. Ct. 2206 (2018) (No. 16-402).
[30] *Id*.
[31] *See* Alex Abdo, WHY RELY ON THE FOURTH AMENDMENT TO DO THE WORK OF THE FIRST?, 127 Yale L.J. Forum 444 (2017); Bara, *supra* note 143.

protection of First Amendment-protected behavior that is likely chilled by targeted police surveillance."[32]

When protestors' rights hang in the balance, they are not protected by an avoidance of the use of First Amendment doctrine, because the Fourth Amendment does little in its absence. A case-by-case analysis using Fourth Amendment precedent alone is insufficient to address the confluence of chilling effects when surveillance technology is used. In the 1970s, reliance on the Fourth Amendment was appropriate, because surveillance posing a chilling effect was more difficult to achieve prior to the digital revolution. The courts have dealt with this issue in criminal procedure incrementally, but their decisions are continuously outpaced by the sophistication of digital advancement. As the universe of publicly available information has expanded, much more government activity can pass muster without violating the Fourth Amendment if the potential First Amendment infringements are sidelined. Whatever the Fourth Amendment currently says about tower dumps, or similar surveillance technology, we need to be thinking about First Amendment issues first. Further, the Court's expressed concern about potential infringements on freedom of association demonstrates a conceivable willingness to embark on independent First Amendment inquiries.

III. IT ALL COMES DOWN TO THE FIRST

Part III considers the shortcomings of the Fourth Amendment, and the unique First Amendment harms posed by government technologies, to suggest a new framework for courts to utilize when protestor speech is chilled by state surveillance.

[32] Matthew A. Wasserman, FIRST AMENDMENT LIMITATIONS ON POLICE SURVEILLANCE: THE CASE OF THE MUSLIM SURVEILLANCE PROGRAM, 90 N.Y.U. L. Rev. 1786, 1789 (2015).

Under the First Amendment, impairments of the right to associate must withstand exacting scrutiny.[33] In turn, protestors' freedom of association should only be permissibly overridden "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[34] This standard holds even "if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct."[35] Whether the use of tower dumps during protests is so tailored is a determination the courts must make, while taking into consideration the stark differences in how government actors chill free speech in the pre and post-digital age where social media platforms and smart devices play a large role in the dissemination of information.

A common thread in recent landmark Fourth Amendment jurisprudence is the consistent reminder that past Fourth Amendment case law cannot be mechanically applied on top of new digital age searches.[36] There is no reason the same pragmatic approach should not apply to First Amendment cases. The insight gleaned from recent Fourth Amendment cases is important in considering new First Amendment concerns as applied against older First Amendment rules. Rather than formulaically applying existing rules to unprecedented facts, courts must be open-minded to crafting new protections for new challenges. Law enforcements' use of tower dumps

[33] Clark v. Library of Congress, 750 F.2d 89, 94 (D.C.C. 1984).
[34] *Dale,* 530 U.S. at 640–41.
[35] *Clark*, 750 F.2d at 94 (internal citation & mark omitted).
[36] *See Carpenter,* 138 S. Ct. at 2222 ("When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents."); *Riley,* 573 U.S. at 394 ("We expect that the gulf between physical practicability and digital capacity will only continue to widen in the future."); *Jones,* 565 U.S. at 417 (Sotomayor, J., concurring) ("This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."); Kyllo v. U.S., 533 U.S. 27, 36 (2001) ("[T]he rule we adopt must take account of more sophisticated systems that are already in use or in development.").

to surveil alleged suspects of crimes involved in protests, which inexorably results in tracking of a large swath of protestors, is one example of a conventional Fourth Amendment issue that implicates the First Amendment. Other surveillance tools such as geofences, stingrays, and drones could trigger First Amendment concerns and require an independent analysis as well.[37] There is no magic formula to deciding the permissibility of law enforcement's actions when free speech and privacy issues are at the fore. The point is, rather, that when both are implicated, the conduct cannot only be assessed under the Fourth Amendment, but must also be assessed under the First Amendment.

Though there are some differences between the surveillance in prior freedom of association cases and in tower dumps,[38] that does not preclude an application of the doctrinal tests or constitutional thresholds for permissible or impermissible encroachments on First Amendment rights. Otherwise put, courts should be able to apply the test for freedom of association encroachments to tower dumps in a protest setting. Highly sophisticated technological tools that can instantaneously unmask everyone at a First Amendment-protected event, such as a protest against policy brutality, were not available when the Court recognized the "vital relationship between freedom to associate and privacy in one's associations" in 1958.[39] However, tower dumps are akin to forced disclosure of digital databases of protest participants like in *NAACP*.

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[37] *See* Meyer *supra* note 24.

[38] *NAACP* addressed compelled disclosure of membership lists which belonged to the *NAACP*. *NAACP,* 357. U.S. at 453 ("Over petitioner's objections, the court ordered the production of a substantial part of the requested records, including the membership lists."). In the matter of tower dumps to identify protestors, law enforcement is not demanding disclosure of membership lists directly from Black Lives Matter or another analogous organization, but rather, seeks the data from phone companies. *See* Remington, *supra* note 18 ("The police can then go back to the phone company and ask for identifying information.").

[39] *NAACP,* 357 U.S. at 462.

This Comment's proposed judicial framework addressing the chilling effects of government surveillance on protestor speech will balance various factors of the challenged state conduct.[40] Surveillance program factors include: 1) the breadth of the program; 2) the intent of the program; and 3) the level of aggregation resulting from the program. The judicial scrutiny in freedom of association cases necessarily involves balancing these factors, requiring each surveillance program to be assessed individually.

While it has been argued that balancing tests often have deleterious results for those seeking vindication for alleged constitutional violations,[41] a multi-factor analysis is still the superior path for the judiciary to chart given the complexities of government surveillance technology and its uses. The most axiomatic advantage of this factor test is that the presence of a test at all is superior to the absence of one. Secondly, while the use of balancing was historically attacked in the mid 20th century for "the illiberal results it produced in free speech cases,"[42] it was indisputably an important tool in the seminal associational rights cases mentioned at length in this Comment, and has been used in First Amendment cases even more in the past decades.[43] Judicial discretion can be used in a balancing assessment to tip the scales in favor of the government—as has been done in Fourth Amendment cases—but bright line rules regarding permissibility of proferred legitimate law enforcement investigatory tactics are more susceptible to dsicretiaonry abuse than a process that takes into consideration the nuances of a program and

[40] Given the complexities of the interrelated issues at hand, such as the varying scopes and targets of the surveillance tools, brightline rules are best to be avoided, in favor of a dynamic test that considers multiple factors. How the courts would procedurally apply freedom of association doctrine to government surveillance challenges would depend on both factors related to the surveillance program itself, and at what stage of the judicial process the program is being challenged.

[41] Nadine Strossen, THE FOURTH AMENDMENT IN THE BALANCE: ACCURATELY SETTING THE SCALES THROUGH THE LEAST INTRUSIVE ALTERANTIVE ANALYSIS 63 N.Y.U. L. Rev. 1173, 1266 (1988) (arguing the Fourth Amendment reasonableness or balancing test "has the effect of eroding the fundamental privacy and liberty rights protected by the fourth amendment.").

[42] T. Alexander Aleinikoff, CONSTITUTIONAL LAW IN THE AGE OF BALANCING, 96 Yale L. Rev. 943 (1987).

[43] *Id.* at 967.

the impact on the target of surveillance. So long as there is transparency about the "valuation standards"[44] and courts avoid nebulous declarations that appropriate conclusions were reached without clarifying the interests considered, a balancing test is the most fair way to adapt to the technological advancements of both government surveillance and modern protest. These factors will help the court more pragmatically assess the potential chilling effects of government technology, while taking into consideration the nuances of investigatory policies, and which tactics cross the line into overly invasive surveillance.

A. Scope of the Program

The scope of a government surveillance program is an important factor in this Comment's suggested framework. For example, whether tower dumps are contemplated within a broader surveillance program or operate as individual, non-systemic police requests fare differently on the First Amendment burden. Lower courts have noted the lack of consistent guidance in determining when "a surveillance system became so intrusive as to create a reasonable or objective chill in a plaintiff and therefore present a justiciable controversy."[45] To begin, systematic efforts to identify protestors will be viewed with more skepticism than isolated tower dumps. If the Department of Homeland Security has an ambitious program designed to surveil protestors on a broader scale, a First Amendment chill will be easier to prove in court. The prospect of a modern agency-wide surveillance program specifically targeting protestors would hardly be comparable to surveillance tactics primarily relying on media reports and agents attending public meetings.[46] Concern in this vein would not turn on the actions of a single

[44] *Id.* at 976.
[45] Alliance to End Repression v. City of Chicago, 627 F. Supp. 1044, 1048 (N.D. Ill. 1985).
[46] *Tatum*, 408 U.S. at 6.

sergeant, but rather, a police commission developing an anti-protest task force and instructing all officers to utilize tower dumps to track individuals.

If the program is part of an organized system of multidimensional surveillance, the analysis would also lean more in favor of protestors. A government agency tool combining tower dumps, drone surveillance, and social media monitoring is the exact "unrestrained power to assemble data" warned of that is "susceptible to abuse."[47] Conversely, courts will be less likely to find a chilling effect on freedom of association if law enforcement agents act alone in furtherance of an investigation.

B. Intent of the Program

Second, the proposed framework assesses the intent of the surveillance program (or individual tower dump request). National security and legitimate law enforcement activities are generally considered legitimate state interests,[48] but the relationship between the professed state interest and invasive burden on protestors depends on what, if any, crime is being investigated. The burden is on the government to prove its compelling state interest, which means it must specify and justify its reason for mounting the program.[49] The program also cannot be overbroad.[50] For example, a policy to arbitrarily monitor protestors will be treated differently than one to investigate serious crimes. The invocation of national security in investigative duties has been recognized as a "greater jeopardy to constitutionally protected speech."[51] If a surveillance program using tower dumps on protestors is justified "under so vague a concept as

[47] *Jones,* 565 U.S. at 416 (Sotomayor, J., concurring) (internal marks omitted).
[48] *Keith*, 407 U.S. at 311 ("Though the Government and respondents debate their seriousness and magnitude, threats and acts of sabotage against the Government exist in sufficient number to justify investigative powers with respect to them.").
[49] *Clark,* 750 F.2d at 94.
[50] Skaggs, *supra* note 56 at 1492.

[51] *Keith*, 407 U.S. at 311.

the power to protect domestic security," courts should consider the chilling effect greater.[52] If an agency has a broad policy to use tower dumps to track Black Lives Matter protestors under the guise of prophylactic domestic security, courts will be more skeptical.

If the policy is triggered only when investigating serious crimes unrelated to core First Amendment activity, courts will be more deferential to law enforcement. An example of this variety would be investigation of a crime that took place during a demonstration, but whose surveillance prompting was disconnected from the ideological motivations of said demonstration. Even then, what crimes are supposedly being investigated through tower dumps or other surveillance tactics should be considered. The intrusiveness of location tracking should not be outweighed by capricious government tactics, such as seeking information on protestors based on loose accusations of criminal activity. Civil disobedience is a generally expected part of protests against governments.[53] Reports of tense, but largely non-violent, encounters between protestors and police officers should not warrant widescale data acquisition of copious amounts of people in the vicinity. In a similar vein, while "the Fourth Amendment might permit officers to track the cellphones of protesters to gather evidence of jaywalking" or other lesser crimes, "the First Amendment might prohibit that surveillance as too invasive to be used to investigate an offense so minor."[54] The extant nuances in varying uses of surveillance technology require independent analyses for the reasons presented; the nature of the investigation, coupled with the intent behind the surveillance, come in myriad degrees.

C. Government Interest

[52] *Id.* at 314.
[53] Harrop A. Freeman, THE RIGHT OF PROTEST AND CIVIL DISOBEDIENCE, 41 Ind. L.J. 228, 229 (1966).
[54] Abdo *supra* note 149.

The government interest in the surveillance program is another important factor. Even if policies to use tower dumps are only activated to aid in criminal investigations, as opposed to specifically and broadly target protestors, the invasiveness of the program's goals can vary greatly. For example, exclusive criminal investigatory interests in using tower dumps can result in divergent objectives, ranging from wanting to identify single suspects to assembling dossiers on everyone in the vicinity. The narrower the reach of the program, the more likely it is to survive constitutional scrutiny.

Relatedly, pretextual intent will weigh a court's analysis in favor of protestors. If law enforcement is investigating a homicide that happened to take place at a protest, the inquiry will be more partial to government interests than the comparatively lesser burden imposed on demonstrators. However, if the crime of investigation is directly related to First Amendment activity, courts should be especially conscious of the justification. For example, courts should be skeptical that investigation of minor crimes closely related to protest activity, such as obstruction of traffic, is worth the imposed burden.

D. Aggregation Practices

Lastly, the aggregation practices within a tower dump request or broader surveillance policies are important. Tower dumps that discard data determined irrelevant to the criminal investigation and do not retain relevant data beyond the needs of the investigation will more likely pass constitutional muster. This is because a more carefully circumscribed tower dump is more carefully tailored to the state's interest in an investigation, as opposed to more arbitrary and unending data collection of individuals' information.

Conversely, it will be much more difficult for the government to argue a policy retaining data of a broad swath of loosely grouped people serves the state's interest in effective law

enforcement investigations, and that the policy is unrelated to the suppression of ideas.[55] Courts will be wary if law enforcement agents routinely seek data from one cell tower or multiple towers in a range concerningly far from the original suspected crime scene. If an alleged crime took place at Millennium Park, for example, seeking data from cell towers far outside of that range would be overly broad. Aggregating data of thousands of Black Lives Matter protests without linking individuals to specific investigations raises similar concerns as gang affiliation databases, criticized for defining affiliation too broadly, and that "carelessly criminalizes people of color, and exposes them to wrongful arrests, convictions, and deportations."[56]

All of these factors are used to determine whether interferences with the right to freely associate are justified in the exercise of the government's legitimate, compelling interests.[57] We know that "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost."[58] The power in this collective effort can only be justified through the most narrow of means, with the most superseding of interests. Given the historic import conferred on freedom of association, it is clear the courts should adopt a First Amendment framework when government surveillance infringes on that freedom.

[55] *Dale,* 530 U.S. at 640–41.
[56] Vaidya Gullapalli, *Spotlight: the dangers of gang databases and gang policing*, THE APPEAL (July 3, 2019), https://theappeal.org/spotlight-the-dangers-of-gang-databases-and-gang-policing/.
[57] *Tucker*, 364 U.S. at 490.
[58] N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 907–08 (1982).

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Date of JD/LLB	**May 14, 2024**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Northeastern University Law Review**
Moot Court Experience	**No**

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Judicial Internships/ Externships	**Yes**
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Honorable Juan R. Sánchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Judge Sánchez,

I am a rising third-year law student at Northeastern University School of Law, writing to apply for a 2024-2025 term clerkship in your chambers. I grew up in the Philadelphia area (Chester County) and hope to return the Philadelphia area after graduation in order to be closer to friends and family. I plan to pursue a career in civil rights litigation, with a particular focus on LGBTQ+ rights. A clerkship in the Eastern District of Pennsylvania would serve as a foundation for this career by further enhancing essential research and writing skills.

I believe that my past experiences in legal research and writing have prepared me to make thoughtful and useful contributions to your chambers and to the court. As an intern in Judge Thompson's chambers at the First Circuit Court of Appeals, I wrote bench memoranda for her upcoming cases, providing in-depth analysis on a range of complex issues in both civil and criminal law. I am grateful to have had an opportunity to study Judge Thompson's exceptionally clear and straightforward writing style, which has influenced how I approach all legal writing.

In my position as Executive Articles Editor of Northeastern University Law Review, I oversee the entirety of the journal's submissions process as well as the editing process for selected articles. Through this position, I engage in a wide range of scholarship relating to public interest practice. Furthermore, last fall, I served as Teaching Assistant for our Legal Research & Writing course, where I guided first-year students learning to navigate the research process and produce their first pieces of legal writing. As a result of these experiences, I have learned to conduct efficient and accurate research and to produce clear and concise writing.

Enclosed please find my resume, writing sample, and transcript for your review. The following recommenders will be providing letters of recommendation: Professor Daniel Medwed; Professor Rebecca Chapman; Attorney Jonathan Cohen. Thank you for your time and consideration.

Respectfully,

Max Bloodgood

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EDUCATION

NORTHEASTERN UNIVERSITY SCHOOL OF LAW, Boston, MA
Juris Doctor Candidate, May 2024
Activities: Executive Articles Editor, *Northeastern University Law Review* (2023-2024); Executive Board Member (Trans/Nonbinary Committee), Queer Caucus
Teaching: TA, Legal Research & Writing, Professor Chapman (Fall 2022)
Research: Independent study with Prof. Libby Adler; researching limitations of litigation for LGBTQ rights

DUKE UNIVERSITY, Durham, NC
Master of Arts, summa cum laude, in Liberal Studies, May 2020
Thesis: "Multiple Archives, Multiple Futures: Reexamining the Socialism of the Combahee River Collective Statement" (https://hdl.handle.net/10161/20705)
Honors: Exemplary Masters Project Award

UNIVERSITY OF PITTSBURGH, Pittsburgh, PA
Bachelor of Arts, summa cum laude, in English Writing & English Literature, April 2017
Honors: University Honors College Scholar (top 3% of College of Arts & Sciences)

PROFESSIONAL EXPERIENCE

FIRST CIRCUIT COURT OF APPEALS, HON. JUDGE THOMPSON, Boston, MA — Jan. 2023-Apr. 2023
Judicial Intern (Full-time)
Researched pending cases to assist Judge Thompson in preparing for monthly sitting weeks, performed fact and law checks for draft opinions, and assisted in opinion drafting for both civil and criminal cases.

CIVIL RIGHTS & RESTORATIVE JUSTICE PROJECT, Boston, MA — May 2022-Aug. 2022
Legal Intern
Conducted investigations of racially motivated homicides between 1930-1970, facilitated restorative justice process with victims' descendants, and created system to track reparations and restorative justice legislation nationwide.

ROWMAN & LITTLEFIELD PUBLISHING GROUP, Lanham, MD — Oct. 2020-Aug. 2021
Assistant Digital Publishing Representative
Facilitated creation and distribution of e-books to online vendors, developed metadata and quality audit process, and resolved copyright violation reports from authors and editors.

DUKE UNIVERSITY PRESS, Durham, NC — Aug. 2019-May 2020
Books Marketing Intern
Created print and digital marketing materials, fielded promotional copy requests, and tracked book reviews.

CHESTERTON HOUSE, Ithaca, NY — Jun. 2017-Jun. 2018
Student Engagement Fellow
Mentored twelve undergraduate students in living-learning community at Cornell University and led project to digitize library catalog of 3,000+ books and journals.

NORTHEASTERN UNIVERSITY

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Major : Law

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
INSTITUTION CREDIT:						
Fall 2021 Law Semester (08/30/2021 - 12/22/2021)						
LAW	6100	Civil Procedure	5.00	HH	0.000	
LAW	6105	Property	4.00	H	0.000	
LAW	6106	Torts	4.00	HH	0.000	
LAW	6160	Legal Skills in Social Context	2.00	HH	0.000	
LAW	6165	LSSC: Research & Writing	2.00	HH	0.000	
Ehrs:17.000 GPA-Hrs: 0.000 QPts: 0.000 GPA: 0.000						
Spring 2022 Law Semester (01/10/2022 - 05/06/2022)						
LAW	6101	Constitutional Law	4.00	HH	0.000	
LAW	6102	Contracts	5.00	H	0.000	
LAW	6103	Criminal Justice	4.00	HH	0.000	
LAW	6160	Legal Skills in Social Context	2.00	HH	0.000	
LAW	6165	LSSC: Research & Writing	2.00	HH	0.000	
Ehrs:17.000 GPA-Hrs: 0.000 QPts: 0.000 GPA: 0.000						
Summer 2022 Law Semester (05/09/2022 - 08/23/2022)						
COOP: Civil Rights & Restorative Justice Project						
at Northeastern University School of Law (CRRJ)						
Boston, MA						
LAW	7940	Reflections on Lawyering	1.00	HH	0.000	
LAW	7941	Pub Int Pub Serv Field Placemt	7.00	CR	0.000	
LAW	7966	Public Interest Co-op Work Exp	0.00	CR	0.000	
Ehrs: 8.000 GPA-Hrs: 0.000 QPts: 0.000 GPA: 0.000						
Fall 2022 Law Semester (08/29/2022 - 12/23/2022)						
LAW	7320	Constitutional Litigation	3.00	HH	0.000	

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
LAW	7323	Corporations	4.00	HH	0.000	
LAW	7443	Professional Responsibility	3.00	HH	0.000	
LAW	7612	Wrongful Convictions	3.00	HH	0.000	
LAW	7937	Teaching Assistant	2.00	HH	0.000	
Ehrs:15.000 GPA-Hrs: 0.000 QPts: 0.000 GPA: 0.000						
Spring 2023 Law Semester (01/09/2023 - 04/29/2023)						
COOP: U.S. Court of Appeals for the First						
Circuit, Judge Thompson						
Providence, RI						
IN PROGRESS WORK						
LAW	7964	Co-op Work Experience	0.00	IN PROGRESS		
In Progress Credits 0.00						
Summer 2023 Law Semester (05/08/2023 - 08/26/2023)						
IN PROGRESS WORK						
LAW	7332	Evidence	4.00	IN PROGRESS		
LAW	7424	Labor Law 1	4.00	IN PROGRESS		
LAW	7448	Employment Discrimination	3.00	IN PROGRESS		
LAW	7678	Legal Research Workshop	1.00	IN PROGRESS		
LAW	7936	Law Review - Executive Editor	2.00	IN PROGRESS		
LAW	7978	Independent Study	3.00	IN PROGRESS		
In Progress Credits 17.00						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	57.000	0.000	0.000	0.000
TOTAL TRANSFER	0.000	0.000	0.000	0.000
OVERALL	57.000	0.000	0.000	0.000

********** END OF TRANSCRIPT **********

Rebecca Hunter Assoc VP & University Registrar